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No. 433

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

ALFRED SHYMAN, doing business under the assumed name, business and style of ALASKA DISTRIBUTORS COMPANY,
Petitioner,

vs.

PHILIP B. FLEMING, Temporary Controls Administrator,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

and

BRIEF IN SUPPORT OF PETITION

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THE ARGUS PRESS, SEATTLE

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Page

INDEX TO PETITION

PETITION FOR WRIT OF CERTIORARI 1
Summary Statement of the Matter Involved 1
Jurisdictional Statement 7
Questions Presented 8
Reasons Relied on for Allowance of Writ of Certiorari 9
1. The decision in this case is at variance with decisions of other courts 10
2. The present decision upholds the contention of the O.P.A. that the purchase and sale by Petitioner was a "domestic" sale in the state of Washington 13
4. This case should be dismissed because erroneously based upon non-applicable order No. 3 under M.P.R. No. 193 and 2nd Revised Maximum Export Price Regulation, instead of being based upon applicable M.P.R. No. 194 19
5. The present decision gives no consideration to the good faith exercised by Petitioner in this case 21

CASES CITED IN PETITION

Addison v. Holly Frost Products, 322 U.S. 607 at 618(6) 15
Anchorage Grocery, In the Matter of. Opinion on Order Denying Protest, Docket No. 1288-2-P., April 6, 1945. 3 Opinions and Decisions of the Administrator, 3 O.P.A. Service, pp. 156-157..10-11
Anderson v. Mercado, 163 F.(2d) 303 at 306 11
Belkin v. Fleming, 161 F.(2d) 197 at 198, 199 (Em. Ct. of App.) (March 27, 1947) 12
Blodgett v. Holden, 275 U.S. 142 at 146-149 22
Bowles v. Case, 149 F.(2d) 777 at 778(1) 12
Bowles v. Jung, 57 F. Supp. 701 at 706-707 18
Bowles v. Wilson & Co., 63 F. Supp. 687 at 689 18
Brown v. Wyatt Food Stores, 49 F. Supp. 538 19
Carter v. Commonwealth of Virginia, 321 U.S. 131 at 137-138, 141, 142 14

Page

Case v. Bowles, 327 U.S. 92, at 98(7) 15
Case v. Bowles, 327 U.S. 92 at 102(11), 90 L. ed. at 560 23
C. M. & St. P. Ry. v. Pub. Util. Cm., 27 U.S. (71 L. ed.) 1085 at 1090 15
Collins v. Bowles, 152 F.(2d) 760 at 762 (Em. Ct. of App.) 12
Collins v. Fleming, 159 F.(2d) 431, at 437, 438, 439; certiorari denied 67 S. Ct. 1094, April 7, 1947 14
Darling & Co. v. Fleming, 158 F.(2d) 387 at 388, 389, 390 (Em. Ct. of App.) 12
Direct Realty Company v. Porter, 157 F.(2d) 434 at 439(4) 23
Duckworth v. State of Arkansas, 314 U.S. 390, at 398, 399 15
Estey v. U. S., 327 U.S. 114 at 128, 90 L. ed. at 576 23
Fasons Realty Corporation v. Bowles, 146 F.(2d) 499 at 500 (Em. Ct. of App.) 12
Fleet v. Bowles, 142 F.(2d) 559, 564(1) (Em. Ct. of App.) 11
Fleming v. Moberly Food Stores, 49 F. Supp. 538.. 19
Fleming v. Van Der Loo, 160 F.(2d) 906, at 911, 912, 913 (No Petition for Certiorari filed) 22
Halibut Producers' Cooperative v. Porter, 157 F. (2d) 332 at 336(1) (2) 15
Hamilton v. Kentucky Distilleries & Warehouse Company, 251 U.S. 146 at 155 (Mr. Justice Brandeis) 15
Hawaii Brewing Co. v. Bowles, 148 F.(2d) 346 at 350(5) (Em. Ct. of App.) 11
Hulbert v. Twin Falls County, 327 U.S. 103 at 106, 90 L. ed. 562 23
Indianapolis Brewing Company v. Liquor Control Commission, 305 U.S. 391 at 394 14
International Shoe Co. v. State of Washington, 22 Wn.(2d) 146 25
International Shoe Co. v. State of Washington, 66 Sup. Ct. 154 at 159-160 25

Page

Joseph S. Finch & Company v. McKittrick, 305 U. S. 395, at 397, 398 14
M. Kraus & Bros. v. U. S., Vol. 90, No. 11, U.S. S. Ct. (L. ed.) Adv. Dec. 653 at 656, 657, 659 (decided March 25, 1946) 23
W. J. Lake & Co. v. King County (Alaska Distributors as *Amicus Curiae*) 3 Wn.(2d) 500; rehearing 4 Wn.(2d) 651, certiorari denied 311 U.S. 715 13
Mahoney v. Joseph Triner Corporation, 304 U.S. 401, at 403, 404 14
Martini v. Porter, 157 F.(2d) 35, 40 ..... 11, 19
N. P. Ry. v. Dept. of Pub. Wks., 268 U.S. (80 L. ed.) 836 at 839 (Wash.) 15
Opp. Cotton Mills v. Administrator, 312 U.S. 126, 152-153, 85 L. ed. 624 23
Otto Kraft & Sons, In the Matter of. Opinion on Order Denying Protest, Docket No. 1288-3-P., May 12, 1945. 3 Opinions and Decisions of the Administrator, 3 O.P.A. Service, pp. 223-224 11
Porter v. Block (C.C.A. 4) 156 F.(2d) 264 at 269, 270 19
Porter v. Kruger Grocery and Baking Co., 163 F. (2d) 168, at 175(3), 177(5) 22
Porter v. Tanker Gas, 68 F. Supp. 103 at 108, 109-11 19
Porter v. Warner Holding Co., 60 Sup. Ct. 1086, 1089, 1090, 1091 25
S. Roggen & Co. v. Fleming, 159 F.(2d) 707 at 711 16
State Board of Equalization v. Youngs Market Inc., 299 U.S. 59, at 62, 63, 64 14
Supak v. Porter, 158 F.(2d) 803 at 806 (Em. Ct. of App.) 12
Taylor v. Porter, 156 F.(2d) 805 at 811(11) (Em. Ct. of App.) 12
U. S. v. Frankfort Distilleries, 324 U.S. 294 at 301 14
United States v. Johnson, 53 F. Supp. 170, 171, 172, 173 19

Page

F. Uri & Co. v. Bowles, 152 F.(2d) 713 at 715, 718, 719 18
Washington Brewers Institute v. United States, 137 F.(2d) 964 at 966, 967, 968..... 15
Ziffrin Inc. v. Reeves, 308 U.S. 132 at 140(12).... 15

STATUTES AND REGULATIONS

Emergency Price Control Act of 1942 (50 U.S. C.A. 901) *et seq.* 1, 2, 3, 8, 10, 22
8 Federal Register 4132.....8, 10, 16
Federal Register, Doc. 34-780..... 20
Maximum Price Regulation 193.....11, 19, 20
194 .....19, 20, 21
194 Amendment 10 20
Second Revised Maximum Export Price Regulation 1, 8, 10, 16, 19, 20, 21
28 U.S.C.A. §347, Code of Civil Procedure..... 7
Washington State Liquor Act, §23-J (Shyman's Exhibit S.22) 13

CONSTITUTION

United States Constitution, Art. I, §8, Cl. 3..... 3
Fifth Amendment 3, 8
Fourteenth Amendment 3
Twenty-first Amendment 4, 8

INDEX TO BRIEF

Pages

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI..... 27

Opinions of Courts Below..... 27

Jurisdiction 27

Statement of the Case..... 28

Specification of Errors 28

Argument 29

Summary of Argument 29

1. The decision is at variance with decisions of other courts 29

2. The present decision has established an important question of local law in the State of Washington contrary to applicable local decisions..... 29

3. The decision has decided an important question of federal law which has not, but should be, settled by this Court..... 30

4. This decision conflicts with applicable decisions in this Court 30

5. This decision erroneously holds that M.P.R. 194 concerning sales in Alaska, is not applicable to this case 30

6. "Good Faith" of Petitioner justifies a dismissal in this case 30

7. Administrator has no right to overturn established business practices 31

8. Administrator should not be permitted to collect twice for overcharges upon the same transaction 31

1. The Decision in this Case Is at Variance with Decisions of Other Federal Courts of Appeal..... 31

2. The Ninth Circuit Court of Appeals, in the Present Decision, Has Established an Important Question of Local Law of the State of Washington in Conflict with Applicable Local Decisions 39

3. The Decision Has Decided an Important Question of Federal Law which Has Not, But Should Be, Settled by this Court..... 49

Page

4. The Decision in this Case Has Decided Federal Questions in a Way Probably in Conflict with Applicable Decisions of this Court 88
5. This Case Should Be Dismissed Because Erroneously Based Upon Non-Applicable Order No. 3 Under No. 193 and 2nd Revised Maximum Export Price Regulation, Instead of Being Based Upon Applicable M.P.R. No. 194 89
6. "Good Faith" of Petitioner Justifies a Dismissal in this Case 95
7. Administrator Has No Right to Overturn Established Business Practices 106
8. The Administrator Should Not Be Permitted to Collect Twice for Overcharges Upon the Same Transaction 107

Prayer 111

Certificate 112

CASES CITED IN BRIEF

Addison v. Holly Frost Products, 322 U.S. 607 at 618(6) 48

Anchorage Grocery, In re. Opinion on Order Denying Protest, Docket No. 1288-2-P., April 6, 1945. 3 Opinions and Decisions of Administrator, 3 O.P.A. Service, pp. 156-157 ..... 32, 54

Anderson v. Mercado, 163 F.(2d) 303 at 306 ..... 35, 36

Belkin v. Fleming, 161 F.(2d) 197 at 198-199 (Em. Ct. of App.) (March 27, 1947) 36

Blodgett v. Holden, 275 U.S. 152 at 146-149 100

Bowles v. Case, 149 F.(2d) 777 at 778(1) 39

Bowles v. Jung, 57 F. Supp. 701 at 706-707 61

Bowles v. L. D. McLean Co., 61 F. Supp. 454 110

Bowles v. Simon, 145 F.(2d) 334 at 336-337 (C.C. A. 7) 74

Bowles v. Wilson & Co., 63 F. Supp. 687 at 689 ..... 61, 94

Brown v. Wyatt Food Stores, 49 F. Supp. 538 73

Carson Petroleum Co. v. Vial, 279 U.S. 95, 73 L. ed. 626 93

Page

Carter v. Commonwealth of Virginia, 321 U.S. 131 at 137-138 44
Case v. Bowles, 327 U.S. 92 at 98, 66 S. Ct. 438..... 86
Case v. Bowles, 327 U.S. 92 at 102(11), 90 L. ed. at 560 101
C. M. & St. P. Ry. v. Pub. Util. Com., 27 U.S. (71 L. ed.) 1085 at 1090..... 47
Collins v. Bowles, 152 F.(2d) 760 at 762 (Em. Ct. of App.) 36
Collins v. Fleming, 159 F.(2d) 431, at 437, 438, 439; certiorari denied 67 S. Ct. 1094, April 7, 1947 .....42, 70
Collins v. Porter, 328 U.S. 46 at 48 (1, 2).....86, 87
Collins v. Porter, 328 U.S. 46 at 49..... 87
Conklin Pen Company v. Bowles, 152 F.(2d) 764 at 766(4, 5) 75
Darling & Co. v. Fleming, 158 F.(2d) 387 at 388, 389, 390 (Em. Ct. of App.)..... 36
Direct Realty Company v. Porter, 157 F.(2d) 434 at 439 (4) 102
Duckworth v. State of Arkansas, 314 U.S. 390, at 398, 399 45
Duquesne Warehouse Company v. Railroad Retirement Board, 148 F.(2d) 473 at 478, 479 (C.C. A. 2) 81
Estep v. U. S., 327 U.S. 114 at 128, 90 L. ed. at 576 102
Fasons Realty Corporation v. Bowles, 146 F.(2d) 499 at 500 (U.S. Em. Ct. of App., November 17, 1944) 36
Felt Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 at 64-66, 83 L. ed. 488 at 490-491..... 92
Fleet v. Bowles, 142 F.(2d) 559, 564(1) (Em. App.) 35
Fleming v. Van Der Loo, 160 F.(2d) 906, at 911, 912, 913. No Petition for Certiorari filed..... 99
Frane v. Louisville Cement Co., 134 F.(2d) 511 at 516, 146 A.L.R. 926..... 92

Page

General Trading Co. v. State Tax Commission, 322 U.S. 335, at 337-338, 88 L. ed. 1309, 1311-1312.. 92
Gordon v. Bowles, 153 F.(2d) 614, at 615 (1-3) 616 75
Great Northern Co-op Ass'n. v. Bowles, 146 F.(2d) 269 at 271 111
Halibut Producers' Cooperative v. Porter, 157 F. (2d) 332 at 336(1) (2) 48
Hamilton v. Kentucky Distilleries & Warehouse Company, 251 U.S. 146 at 155 (Mr. Justice Brandeis) 47
Hawaii Brewing Co. v. Bowles, 148 F.(2d) 346 at 350(5) (Em. App.) 35
Hoover & Allison Co. v. Evatt, 324 U.S. 652, 89 L. ed. 1252 93
Hulbert v. Twin Falls County, 327 U.S. 103 at 106, 90 L. ed. 562 102
Indianapolis Brewing Company v. Liquor Control Commission, 305 U.S. 391 at 394 43
International Harvester Co. v. Indiana, 322 U.S. 340 at 354-355, 88 L. ed. 1313 at 1321-1322 92
International Shoe Co. v. State of Washington, 22 Wn.(2d) 146 91
International Shoe Co. v. State of Washington, 66 S. Ct. 154 at 158 110
International Shoe Co. v. State of Washington, 66 Sup. Ct. 154 at 159-161 91
Joseph S. Finch & Company v. McKittrick, 305 U.S. 395, at 397, 398 43
K & L Distributors v. Porter, C.C.A. 9, No. 11429.. 108
M. Kraus & Bros. v. U. S., Vol. 90, No. 11, U.S. S. Ct. (L. ed.) Adv. Dec. 653 at 656, 657, 659 (decided March 25, 1946) 101
W. J. Lake & Co. v. King County (Alaska Distributors as *Amicus Curiae*) 3 Wn.(2d) 500; rehearing 4 Wn.(2d) 651, certiorari denied 311 U.S. 715 ..... 40, 92
Mahoney v. Joseph Triner Corporation, 304 U.S. 401, at 403, 404 43

Page

Martini v. Porter, 157 F.(2d) 35 ..... 33, 34
Martini v. Porter, 157 F.(2d) 35, 40 (9th C.C.A.... 71
N. P. Ry. v. Dept. of Pub. Wks., 268 U.S. (80 L. ed.) 836 at 839 (Wash.) 47
Norwegian Nitrogen Prod. Co. v. U. S., 288 U.S. 294 at 318, 77 L. ed. 796 at 809 74
Opp. Cotton Mills v. Administrator, 312 U.S. 126, 152-153, 85 L. ed. 624 102
Otto Kraft & Sons, In re. Opinion on Order Denying Protest, Docket No. 1288-3-P., May 12, 1945. 3 Opinions and Decisions of the Administrator, 3. O.P.A. Service, pp. 223-224 ..... 32, 54
Porter v. Block (C.C.A. 4) 156 F.(2d) 264 at 269, 270 80
Porter v. Kroger Grocery and Baking Co., 163 F. (2d) 168, at 175(3), 177(5) 99
Porter v. Nelson-Picks Creamery Company, 69 F. Supp. 225 at 227 81
Porter v. Tankar Gas, 68 F. Supp. 103 at 108, 109-11 78
Porter v. Warner Holding Co., 60 Sup. Ct. 1086, 1089, 1090, 1091 105
Railroad Com. of La. v. Texas & Pac. Ry. Co., 229 U.S. 336, 57 L. ed. 1215 93
Richfield Oil Corp. v. State Board of Equalization (Nov. 25, 1946) 91 L. ed. Adv. 123 93
S. Roggen & Co. v. Fleming, 159 F.(2d) 707 at 711 48
Spalding & Bros. v. Edwards, 262 U.S. 66, 67 L. ed. 866 93
State Board of Equalization v. Youngs Market Inc., 299 U.S. 59, at 62, 63, 64 43
Supak v. Porter, 158 F.(2d) 803 at 806 35
Taylor v. Porter, 156 F.(2d) 805 at 811(11) (Em. Ct. of App.) 36, 38
Texas & New Orleans R.R. Co. v. Sabine Tram Co., 227 U.S. 111, 57 L. ed. 442 93

Page

Thomas Paper Stock Co. v. Porter, 66 S. Ct. 884, 886-887 63
U. S. v. Frankfort Distilleries, 324 U.S. 204 at 301 45
United States v. Gosho Co., Inc. (C.C.A. 5) 23 F. (2d) 675 93
United States v. Johnson, 53 F. Supp., pp. 170, 171, 172, 173 72
United States v. Pan-American Petroleum Co. (C. C.A. 9) 55 F.(2d) 753, 777 108
F. Uri & Company v. Bowles, 152 F.(2d) 71 at 715, 718(3, 4) 65, 67
Van Der Loo v. Porter, 160 F.(2d) 110, at 112(1) (Em. Ct. of App., September 5, 1946) 75
Washington Brewers Institute v. United States, 137 F.(2d) 964 at 966, 967, 968 46
Yakus v. U. S., 321 U.S. 414, 431, 64 S. Ct. 660 ..... 34, 86
Ziffrin Inc. v. Reeves, 308 U.S. 132 at 140(12) 45

TEXTBOOKS

Gellhorn, Administrative Law, p. 262 87

STATUTES AND REGULATIONS

Code of Civil Procedure, 28 U.S.C.A. §347 28
Emergency Price Control Act of 1942, §2(a) 31, 106
Emer. Price Control Act of 1942, Sec. 2(h) (Public Law 421-77th Congress, Chap. 26, 2nd Session, H.R. 5990) 106
8 Federal Register 4132 31
9 Federal Register 5487 ..... 32, 89
Maximum Price Regulation 193—Order No. 3....64, 89
Maximum Price Regulation 194 ..... 89, 90
Maximum Price Regulation 288 32
O.P.A. Revised Procedural Regulation No. 1 59
Opinion of Chester Bowles, Adm., P.&F .O.P.A., Opinions and Decisions, Vol. 3, p. 303 at 304 75
Second Revised Maximum Export Price Regulation (8 F.R. 4132) 49, 51, 58, 60

Page

Washington State Liquor Act §23J 40
Washington State Liquor Act §289 41

CONSTITUTION

United States Constitution
Fifth Amendment 41
Fourteenth Amendment 41
Twenty-first Amendment 43

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PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Ninth Circuit

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

By his amended complaint the Administrator of the Office of Price Administration alleged that this Petitioner, a resident of Seattle, Washington, "engaged in acts and practices" which constituted a violation of Section 4(a) of the Emergency Price Control Act of 1942 (50 U.S.C.A. 901, *et seq.*); in that "from and including April 27, 1943, defendant *has been an exporter or other seller* * * * *and has sold* whiskey at prices in excess of those established" in Section 3 of the 2nd Rev. Max. Exp. Pr. Reg. By

stitution, and contrary to the provisions of the 21st Amendment.

If any violation of any regulation or order or price schedule of the Office of Price Administration had occurred whereby an overcharge has been made by this Petitioner because of the sale by the Petitioner of Tom Burns Whiskey in Alaska prior to October 1, 1943, such overcharge on such sale was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.

By the Pre-Trail Order the following were Agreed Facts (R. 39-43):

Alfred Shyman, doing business under the assumed name and style of Alaska Distributors Company was, between the dates of April 1 to September 1, 1943, inclusive, a resident of Seattle, Washington, and maintained an office in the Maritime Building, 911 Western Avenue, Seattle, Washington.

That the details of Petitioner's course of dealing with purchasers in Alaska are as follows:

Shipments of "Tom Burns" whiskey were made by Petitioner between April 30, 1943, and October 1, 1943, to retail customer dealers located in 39 cities or towns in Alaska.

Defendant's resident salesmen in Alaska during the year 1943, were as follows: (naming eight agents).

The territory of each agent was assigned so that he could cover the cities or towns in Alaska most easily available to the city in which such agent resided. In such manner all of the retail liquor dealers in all cities,

or towns, in Alaska as described hereinabove were sold "Tom Burns" whiskey in 1943.

Petitioner is licensed to sell and distribute liquor and liquor products only in Alaska, his application for license, and his license, for the year 1943, authorized Petitioner to transact such business throughout the entire territory of Alaska.

Petitioner's agents had full authority to make contracts, and/or commitments binding upon Petitioner as to all sales made by them. When such contracts were made they were forwarded to Joe Meherin, Petitioner's chief agent in Juneau, Alaska, who in turn forwarded the order to Petitioner in Seattle, or in 2% of the cases the orders were forwarded direct by such agents to Petitioner in Seattle. Shipments on such orders made from Seattle direct to the customer dealers by Petitioner in shipping space arranged for by the Petitioner in Seattle. Such agents frequently visited the different dealers where Petitioner's products were being used, and on such occasions they would note the manner in which the dealer carried on his business and the use of Petitioner's liquor. If any difficulties were being experienced — either in quantity or quality of the liquors furnished by Petitioner, or if any complaints were made by such dealers, such agents had full authority to make such adjustments, compromises, allowances of accounts or such other settlement as seemed necessary or advisable to the agent on the spot.

Such agents reported and transmitted to Petitioner in Seattle the collections made by them. Petitioner then remitted to the agents their commissions on sales,

such agents receiving their pay in the form of commissions from which they paid their own expenses.

In fulfillment of the orders sent by his Alaska agents, Petitioner purchased the necessary liquors or liquor products from manufacturers, wholesalers or jobbers in the United States or in other countries. On the arrival of said liquors in Seattle the liquors, including the "Tom Burns" whiskey, were warehoused in their original packages as provided by the rules and regulations of the Washington State Liquor Control Commission and the laws of the State of Washington. Thereafter, it was segregated into lots by the Petitioner in conformity to the orders forwarded by Petitioner's agents in Alaska, shipped from Seattle, Washington, to the Alaska purchasers and invoiced by the Petitioner.

None of the "Tom Burns" whiskey here involved was consumed or used in the State of Washington, nor sold to anyone for use in the State of Washington.

The Petitioner paid an excise tax to the Territory of Alaska in 1943 of 1% upon all liquors sold by him or his agents in Alaska up to $500,000, the total excise tax being $5,000. That said excise tax was in accordance with the terms of the 1943 Alaska license issued to the Petitioner, a copy of said license being Petitioner's "Exhibit S.23 and S.24."

At no time between the dates of March 25, 1943, and October 1, 1943, was there any maximum price for the sales of "Tom Burns" whiskey in the Territory of Alaska.

Other facts pertinent to the case are set forth at the appropriate places in the Argument hereinafter.

JURISDICTIONAL STATEMENT

Petitioner's sole business is the sale and distribution of liquor in Alaska; he also had an office in the City of Seattle, State of Washington, to comply with the requirements of the Washington State Liquor Control Board for transhipment of liquors through that state (R. 578). Respondent represents an agency of the United States Government. The judgment of the United States Circuit Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court, was filed and entered on August 15, 1947. The order denying the Petition for Rehearing was filed by the said Circuit Court of Appeals on October 8, 1947 (R. 838-839) and an order was thereafter entered by said court withholding its mandate until November 10, 1946, to enable petitioner to file his Petition for a Writ of Certiorari herein. It is contended that the United States Supreme Court has jurisdiction to review the judgment here in question under Section 240 of the Code of Civil Procedure, as amended by 28-U.S.C.A., Section 347. The questions involved in this case are of transcending importance concerning, as they do, the applicability and enforcement of the O.P.A. regulations. Also, the present decision of the lower court conflicts with decisions of other Federal Courts of Appeals; conflicts with applicable local decisions, has decided an important question of federal law not yet settled by this Court, and has decided a federal question in conflict with the decisions of this Court.

QUESTIONS PRESENTED

1. Petitioner's contention in this case is that the Respondent Administrator has a duty under Section 2(a) of the Emergency Price Act of 1942 to establish "dollars and cents" prices upon commodities and that the application to Petitioner by the Administrator of items of a "formula" contained in Maximum Price Regulation No. 193, together with Order No. 3 thereunder, and applied by the Second Revised Maximum Export Price Regulation (8 F.R. 4132), are "interpretations" which should be made by the lower courts. The decision by the Ninth Circuit Court of Appeals in this case asserts that such matters concern the *validity* of the above described regulations "cognizable only in the Emergency Court of Appeal" (R. 834) and thus refuses to construe the correct ceiling prices governing sales of Petitioner's commodities. Other Federal courts have ruled otherwise.

2. Can an O.P.A. Administrator's agent *orally* construe that there is a "domestic sale" of liquor in a liquor controlled state? Washington State law holds there can be no "local" sale. The decision in this case ignores such contention thus depriving Petitioner of his rights under the due process clause of the United States Constitution (Fifth Amendment). Also the provisions of the 21st Amendment and the Commerce clause to the United States Constitution are thus violated.

3. The Second Revised Maximum Export Price Regulation has two methods of ascertainment of a ceiling price: (1) "The price at which a commodity was

acquired," served as a basic price; (2) "Maximum domestic price," should be used for such basic price, according to the Ninth Circuit Court of Appeals. At time of the sale of commodities by Petitioner, method (1) was followed on written advice of Administrator's authorized agents, an amount of $20,745.00 *under* the claimed ceiling price as now interpreted. By present oral interpretation under method (2) Petitioner sold at an "over-ceiling price" in the amount of $21,809.00. Present decision holds that method (1) is violative of law, contrary to decisions of other Federal courts.

4. The present decision erroneously holds that for goods sold and delivered in Alaska, Maximum Price Regulation No. 194 is not applicable to this case.

5. District Court held that Petitioner acted in utmost good faith. Present decisions gives such fact no consideration. Other Federal courts have ruled that such good faith in following the provisions of an obscurely worded regulation, is sufficient as a dismissal of the case. In connection therewith an undenied loss of $18,000 by Petitioner in following an erroneous interpretation by Administrator's authorized representative, should equitably have been allowed as an offset.

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

The points raised in the decision of the Ninth Circuit Court of Appeals, and Petitioner's answers thereto, are set forth at length in the brief attached to this Petition. Consequently, for the purposes of this Peti-

tion it would seem sufficient to make merely a brief statement herein of such points and answers. All of the cases cited in this statement are quoted quite fully in said Brief.

1. The decision in this case is at variance with decisions of other courts.

The Brief hereinafter elaborates upon the contention:

> "The Ninth Circuit Court of Appeals in the present decision states 'Another point urged' (by Petitioner) 'is that in the absence of a written order or regulation establishing dollars and cents ceiling prices at Seattle no basis exists for the charge of price violation' (R. 833). * * * A short answer to the argument is that it amounts to an attack on the validity of the regulation cognizable only in the Emergency Court of Appeals" (R. 834).

Answer (quoting from brief hereinafter):

> "As asserted in that Court, this Petitioner did not make, nor is he now making any attack upon the validity of the Second Revised Maximum Export Price Regulation (8 F.R. 4132). Our contention has always been that the Administrator utterly failed in this case to carry out his basic duty of establishing *any* price upon Tom Burns Whiskey, in Seattle, by an order, regulation or *price schedule* as required by Sec. 2(a) of the Emergency Price Control Act of 1942.
>
> "The Administrator himself established in Alaska on July 29, 1942, the 'dollars and cents' method for commodities sold in Alaska."
>
> *In the Matter of Anchorage Grocery.* Opinion on Order Denying Protest, Docket No.

1288-2-P., April 6, 1945. 3 Opinions and Decisions of the Administrator, 3 O.P.A. Service, pp. 156-157;

In the Matter of Otto Kraft & Sons. Opinion on Order Denying Protest, Docket No. 1288-3-P., May 12, 1945. 3 Opinions and Decisions of the Administrator, 3 O.P.A. Service, pp. 223-224.

* * * * * * * * * * *

Also, in Minnesota where he established prices upon Tom Burns whiskey.

M.P.R. 193, Order No 3, Plaintiff's Exhibit 2 (R. 44).

Also, in San Francisco, where the Ninth Circuit Court of Appeals itself recited that it "was necessary" that an order be made by the Administrator setting a "dollars and cents" value of $37.61 per case upon Dunbar's Whiskey.

Martini v. Porter, 157 F.(2d) 35 at 40.

And likewise in Puerto Rico where a "dollars and cents" value of 13 cents per gallon *at the place of delivery* was established for molasses.

Anderson v. Mercado, 163 F.(2d) 303 at 306.

"Prices may vary on the same commodity in various localities throughout the United States and its Possessions."

Hawaii Brewing Co. v. Bowles, 148 F.(2d) 346 at 350(5) (Em. Ct. of App.);

Fleet v. Bowles, 142 F.(2d) 559, 564(1) (Em. Ct. of App.);

Supak v. Porter, 158 F.(2d) 803 at 806 (Em. Ct. of App).

Other Courts have held that the question as to what were the maximum prices to which Petitioner was subject in no way involves the validity of the regulation but merely its application to the facts of Petitioner's case. The district court not only *may but must* deal with such question.

Belkin v. Fleming, 161 F.(2d) 197 at 198-199 (Em. Ct. of App.) (March 27, 1947);

Collins v. Bowles, 152 F.(2d) 760 at 762 (Em. Ct. of App.);

Darling & Co. v. Fleming, 158 F.(2d) 387 at 388, 389, 390 (E. Ct. of App.);

Taylor v. Porter, 156 F.(2d) 805 at 811(11) (Em. Ct. of App.);

Fasons Realty Corporation v. Bowles, 146 F.(2d) 499 at 500 (Em. Ct. of App.)

The Ninth Circuit Court of Appeals itself has taken jurisdiction to construe a regulation, even though the O.P.A. Administrator had contended that the validity of the regulation was thus being questioned and the Emergency Court had sole jurisdiction.

Bowles v. Case, 149 F.(2d) 777 at 778(1).

2. The present decision upholds the contention of the O.P.A. that the purchase and sale by Petitioner was a "domestic" sale in the state of Washington.

Answer.

Such decision is contrary to the State Liquor law and the decisions of the State Supreme Court.

> *W. J. Lake & Co. v. King County* (Alaska Distributors as *Amicus Curiae*) 3 Wn. (2d) 500; rehearing 4 Wn.(2d) 651, certiorari denied 311 U.S. 715.

The present decision holds that Kessler & Levine, doing business at K & L Distributors, *sold and delivered* the liquor in this case, to Alfred Shyman, doing business as Alaska Distributors Company, in the City of Seattle, State of Washington; that such sale *and delivery* constituted a *domestic sale* in said State of Washington, and that thereby a Seattle "*domestic*" price was the established price upon which Petitioner Shyman must base his figures to his customers in Alaska; and that by such circumstances Petitioner Shyman became an "exporter" from Seattle to the Alaska business locations of his customers.

Under the basic law of the State of Washington it is provided in Section 23-J (Shyman's Exhibit S. 22) Pamphlet of the Washington State Liquor Act:

> "A liquor importer's license may be issued to any qualified person, firm or corporation, entitling the holder thereof to import into the State any liquor other than beer; * * * to store the same within the state; *and to sell and export the same from the state;* * * *"

In accordance therewith K & L Distributors had

the right under their Importer's License to import such liquor. But K & L Distributors' duty under the law was to "*sell and export the same from the State.*" There could be no break in the "current of commerce" by the ORAL declaration of an O.P.A. official that the liquors had come to rest in Seattle whereby a "domestic" price would be applicable thereto.

It was not one of the purposes of the O.P.A. Act of 1942 to permit the Administrator to say *orally* that Appellant's purchase was a "domestic" sale. The Administrator's *only* power was to fix prices.

> *Collins v. Fleming*, 159 F.(2d) 431, at 437, 438, 439, certiorari denied 67 S. Ct. 1094, April 7, 1947.

The Supreme Court of the United States in its decisions in recent years has invariably upheld the right of the State to control the sale of liquor within its borders under the 21st Amendment to the Constitution of the United States.

> *State Board of Equalization v. Youngs Market Inc.*, 299 U.S. 59, at 62, 63, 64;
>
> *Mahoney v. Joseph Triner Corporation*, 304 U.S. 401, at 403, 404;
>
> *Indianapolis Brewing Company v. Liquor Control Commission*, 305 U.S. 391 at 394;
>
> *Joseph S. Finch & Company v. McKittrick*, 305 U.S. 395, at 397, 398;
>
> *Carter v. Commonwealth of Virginia*, 321 U.S. 131 at 137-138, 141, 142;
>
> *U.S. v. Frankfort Distilleries*, 324 U.S. 294 at 301;

Duckworth v. State of Arkansas, 314 U.S. 390, at 398, 399.

"There can be no delivery to one not authorized to receive liquor."

Ziffrin Inc. v. Reeves, 308 U.S. 132 at 140 (12);

Washington Brewers Institute v. United States, 137 F.(2d) 964 at 966, 967, 968;

Hamilton v. Kentucky Distilleries & Warehouse Company, 251 U.S. 146 at 155 (Mr. Justice Brandeis).

A defendant in an enforcement proceeding has the right to challenge, on constitutional grounds, whether or not a procedure has been "properly interpreted."

Case v. Bowles, 327 U.S. 92, at 98(7).

"Where the method pursued by the Department is fundamentally erroneous it constitutes a denial of due process of law and the courts do not have to uphold the interpretations of department officials."

N.P. Ry. v. Dept. of Pub. Wks., 268 U.S. (80 L. ed.) 836 at 839 (Wash.);

C.M. & St.P. Ry. v. Pub. Util. Cm., 27 U.S. (71 L. ed.) 1085 at 1090;

Addison v. Holly Frost Products, 322 U.S. 607 at 618(6).

The Statement of Considerations quoted by this decision can be overcome when, as here, such considerations were established on a fallacious basis and were unjustified.

Halibut Producers' Cooperative v. Porter, 157 F.(2d) 332 at 336(1)(2);

S. Roggen & Co. v. Fleming, 159 F.(2d) 707 at 711.

The Ninth Circuit Court of Appeals in its decision states (R. 832):

> "During the time in question [that is, at the date of the sales in April-August, 1943] the Second Revised Maximum Export Price Regulation (8 F.R. 4132) was in effect. *The sales were at prices in excess of those determinable under that Regulation* * * * Section 3(a), (1) of the Regulation provides in part '(a) In the case of an exporter * * * the maximum price shall be (1) *The price at which a commodity was acquired* or the maximum domestic price which would be applicable to a current sale of the commodity to the exporter by the supplier thereof * * *.' It is insisted that the court erroneously based its determination of an overcharge on the maximum price alternative, and did not take into consideration appellant's cost of acquisition. This argument is predicated on the fact that appellant, if an exporter, *concededly paid above-ceiling prices to his suppliers* * * *. Assuming that appellant was free to elect either basis for computation of his price, it seems plain that the phrase 'the price at which the commodity was acquired' cannot fairly be construed to include an over-ceiling price. The rational interpretation of the provision is that *it has reference to an acquisition cost not violative of law.*" (R. 834-835) (Italics ours)

Answer:

The italicized portions above set forth indicate that the Circuit Court of Appeals in its decision procedes on the false premise that Petitioner "concededly

paid above ceiling prices to his suppliers." Thus, according to that court and opposing counsel, there was no alternative method but merely the one method of ascertaining the "maximum domestic price" under the formula of the Regulation.

The brief hereinafter elaborates on the prices involved under the two theories. No representative of the Administrator ever gave a *written* opinion on what the price of Tom Burns Whiskey was in Seattle at the time of Petitioner's sales. There were oral suggestions that under the Maximum Domestic Price theory the ceiling prices of the whiskey were such that Petitioner's sales prices ranged from $19542.18 to $53708.48 in so-called overcharges. Eight interpretations were rendered orally and not one so-called O.P.A. expert agreed with any figures rendered by any other expert. The opinion rendered by the so-called expert on the witness stand was $10000 under the amount claimed to be the over-charge by the enforcement attorney trying the case.

Under the "price at which the commodity was acquired" theory, Petitioner was, an under ceiling price of $20745.38. This theory was the method employed by all O.P.A. agents for sales of liquor in Alaska at all times prior to, and during the time of, the sales in question. Such theory was substantiated by prior written letters to and from authorized O.P.A. agents. The sales herein were made on that theory.

On the other hand no written opinion or interpretation of *any* authorized O.P.A. official *ever* substantiated the "maximum domestic price" theory

which the courts have supported three years subsequent to the sales herein.

(The detailed facts of all of the foregoing are elaborated hereinafter in the Brief). There were never *any* "over-ceiling prices" at the times of the sales and therefore there could never have been any such conceded over-ceiling prices paid by the Petitioner.

As the Brief says, "Thus, the lower court is using its hindsight at the trial three years after the sale in order to provide an interpretation not to be found in any of the definitions of the Administrator existent at the time of the transaction" (R. 536, 537, 538, 553-556; 619; 580-583; 647-648; 698-700; 704-706).

Interpretations by the Administrator are not given the force of law; only regulations have such force. The phrase should be given its ordinary common sense definition.

Bowles v. Wilson & Co., 63 F. Supp. 687 at 689;

Bowles v. Jung, 57 F. Supp. 701 at 706-707.

The Ninth Circuit Court of Appeals does not follow one of its own decisions which states that administrative constructions which did not exist at the time of the sales and which had not then been promulgated by an order or regulation, could not be upheld by the courts.

F. Uri & Co. v. Bowles, 152 F.(2d) 713 at 715, 718, 719.

The foregoing case was upheld and the language therein accentuated by the Emergency Court of Appeals.

Collins v. Fleming, 159 F.(2d) 431 at 437, 438, 439.

The foregoing decision is important in two respects: (1) It establishes that it was the Administrator's own opinion that an order establishing dollars and cents prices at the place of sale was a necessity—which is Petitioner's contention herein. (2) It seems to be at variance with this court's decision wherein an ex post facto order establishing prices was upheld.

Martini v. Porter, 157 F.(2d) 35, 40.

Other courts have confirmed that a subsequent fixing of ceiling prices of a past sale cannot be supported.

United States v .Johnson, 53 F. Supp. 170, 171, 172, 173;

Brown v. Wyatt Food Stores, 49 F. Supp. 538;

Fleming v. Moberly Milk Products Co., 160 F.(2d) 259 at 265. (Footnote 13);

Porter v. Tanker Gas, 68 F. Supp. 103 at 108, 109-11;

Porter v. Block (C.C.A. 4) 156 F.(2d) 264 at 269, 270.

4. This case should be dismissed because erroneously based upon non-applicable order No. 3 under M.P.R. No. 193 and 2nd Revised Maximum Export Price Regulation, instead of being based upon applicable M.P.R. No. 194.

Petitioner's market for his Tom Burns Whiskey being in Alaska, it is Petitioner's contention that O.P.A. Regulation No. 194 is the Regulation applicable to all sales made by Petitioner as a wholesaler to his Alaska dealers (Shyman's Ex. S. 1, R. 44).

As is stated in the Brief hereinafter, "*the maximum price to a buyer in the Territory of Alaska shall be*: (1) *The direct cost to the seller of the commodity sold.* (2) Plus the amount of markup over the direct cost to the seller of the commodity sold during the period from Nov. 7, 1941, to Dec. 6, 1941 * * *" (of a commodity, if the particular brand was not sold during that period). Such "cost to the seller" and the customary 20% "mark-up" was testified to by Petitioner in detail (R. 617, 647-648).

By Amendment No. 10 of M.P.R. 194, it is provided "The provisions of this Maximum Price Regulation No. 194 *supersede the provisions of all other maximum price regulations*, except where other maximum price regulations provide that notwithstanding Maximum Price Regulation No. 194 such other regulations shall be applicable in the Territory of Alaska." This Amendment was filed with the Federal Register (F.R. Doc. 34-780) and was in force during the whole of the period (April, 1943—September, 1943) in which the sales were effectuated by Petitioner to his Alaskan buyers.

In this connection it should be noted that neither Order No. 3 under M.P.R. No. 193, nor the 2nd Rev. Max. Exp. Price Reg. which Respondent contends is the Order and Regulation, *contains any statement therein that "such other regulation shall be applicable in the Territory of Alaska."* Certainly no language can be clearer than the provision in M.P.R. No. 194 that "the maximum price to a *buyer* in the Territory of Alaska shall be."

Also, it should be noted that the Ninth Circuit Court of Appeals bases its statement of the inapplicability of M.P.R. 194 to the sales in this case because the regulation had a provision therein that (§1418.63-(5)):

> "Sales and deliveries to a buyer in the Territory of Alaska do not include sales from a seller outside the Territory of Alaska to a purchaser in the Territory of Alaska. Export sales from a seller in the continental United States to a purchaser in Alaska shall be governed by the maximum prices established for export sales by the Revised Maximum Export Price Regulation."

But such clause is nullified by Amendment No. 10 above noted, adopted in January, 1943, and the fact that 2nd Revised Maximum Export Price Regulation promulgated thereafter in March, 1943, did not contain the saving clause that its provisions were applicable in Alaska.

5. The present decision gives no consideration to the good faith exercised by Petitioner in this case.

Answer:

In its decision the District Court dwelt at length on the good faith exemplified by Petitioner in this case. As the Court says (R. 819-820):

> "*I have never seen proof in any case of more good faith on the part of citizens to try to comply with the O.P.A. statute and regulations than that of Defendants made manifest to the Court in this case.* While good efforts to abide by a rule of law like this may not excuse unintentional failure to comply with it, yet *I emphasize that these defendants in this case, according to the evi-*

dence, have followed a course of praiseworthy conduct in their oral efforts to keep themselves constantly advised of the O.P.A. regulations and changing conditions thereof and the maximum prices thereunder.

"The defense of estoppel, I believe, cannot be sustained, although these Petitioners under the circumstances of this case may have reason to feel disappointed that the law did not do what a reasonable man in an individual case might do and give effect to the letters written by local price office representatives in general terms approving of Defendant's practices."

The Emergency Court of Appeals recognizes, by one of its late decisions, that circumstances similar to those in this case justify the dismissal of the case, based upon the "good faith" clause of the original O.P.A. Act (Paragraph (d), Section 205, Act of 1942) (The decision is quoted at length in the Brief).

Fleming v. Van Der Loo, 160 F.(2d) 906, at 911, 912, 913 (No Petition for Certiorari filed).

In a similar case, on August 15, 1947, the United States District Court of Appeals, 7th Circuit, in a case where the undoubted good faith of the defendant was proven, also dismissed the case.

Porter v. Kruger Grocery and Baking Co., 163 F.(2d) 168, at 175(3), 177(5).

Language in other Federal Court cases would justify a dismissal herein.

Blodgett v. Holden, 275 U.S. 142 at 146-149;

Case v. Bowles, 327 U.S. 92 at 102(11), 90 L. ed. at 560;

M. Kraus & Bros. v. U. S., Vol. 90, No. 11, U.S. S. Ct. (L. ed.) Adv. Dec. 653 at 656, 657, 659 (decided March 25, 1946).

As Mr. Justice Douglas says,

"Only in the event that the language of the Act was explicit would I assume that Congress intended even in days of war to interfere with the traditional sovereignty of the States to the extent indicated."

Hulbert v. Twin Falls County, 327 U.S. 103 at 106, 90 L. ed. 562.

Mr. Justice Murphy has said in concurrence with Mr. Justice Douglas,

"A construction of the Act so as to insure due process of law and the protection of constitutional liberties is not an amendment of the Act. *It is simply a recognized use of the interpretative process to achieve a just and constitutional result* * * *."

Estey v. U. S., 327 U.S. 114 at 128, 90 L. ed. at 576.

"*Procedural due process undoubtedly requires that a hearing be accorded at some stage of an administrative proceeding.*"

Direct Realty Company v. Porter, 157 F. (2d) 434 at 439(4).

"The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective."

Opp. Cotton Mills v. Administrator, 312 U.S. 126, 152-153, 85 L. ed. 624.

A further proof of his good faith and the injustice in this case, was further exemplified by the loss sustained by Petitioner. The record shows that the Petitioner complied at all times with the Regulations of the O.P.A. In accordance therewith he consulted on August 14, 1943, with John B. Sholley, Chief Price Attorney in the Seattle office of the O.P.A. Mr. Sholley gave to Petitioner his determination of the price at which the latter could sell the 1245 cases of pints and 736 cases of fifths of Tom Burns whiskey which he then had remaining as a balance on hand. All of such cases of whiskey were then sold by Petitioner to his Alaska customers at a few cents per case less than the price which Mr. Sholley said were the ceiling prices (R. 600-602).

Taking the Pre-Trial prices designated by Mr. Pearson, the trial attorney in this case, as being the alleged correct ceiling price, and by selling such remaining cases at the prices designated by Mr. Sholley, this Petitioner has sustained an actual loss of $18,-020.25 (R. 600-602). This fact is undenied and not controverted.

In a court of equity there is an inherent right to offset inequity by granting equity. It would seem to be no more than right and proper that this loss of $18,020.25 suffered by Petitioner through the rendition by an authorized O.P.A. official of an erroneous price, should offset any claimed judgment for alleged overcharges innocently made by Petitioner herein.

There is authority that the Federal Court can

adapt their equitable powers to "fair play and substantial justice" as appertain the merits of the case.

Porter v. Warner Holding Co., 60 Sup. Ct. 1086, 1089, 1090, 1091;

International Shoe Co. v. State of Washington, 66 Sup. Ct. 154 at 159-160;

International Shoe Co. v. State of Washington, 22 Wn.(2d) 146.

Furthermore, this Court should correct the error of the lower courts in upsetting the "established business practices" existing as to all Alaska business from 1934 to the present time. This point, together with the existing O.P.A. statute thereon (Price Control Act of 1942, Sec. 2(h)) is elaborated upon in the Brief hereinafter.

It would seem, also, that the equitable qualities of this Court in upholding the doctrine of fair play and substantial justice should be exercised in the circumstances of this case. This Petitioner was merely charged in the Complaint with "sales at illegal prices." The proof, however, was that the so-called "illegality" was based upon the "purchase" by Petitioner "at an illegal price" from K & L Distributors. By the payment of the judgment obtained by Respondent from K& L Distributors in the companion case, the O.P.A. has received *in full* the differential in such "illegal cost." It would seem inequitable and unjust that such differential sum should be collected twice upon the same goods in the same transaction. In such respect, this case can be differentiated from the case cited by the lower court. A detailed explanation, in dollars and cents, is given in the Brief hereinafter.

Wherefore pour Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case number and entitled on its docket No. 11422, *Alfred Shyman*, Appellant, v. *Philip B. Fleming*, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to the Court may seem proper.

Dated this 1st day of November, 1947.

Daniel B. Trefethen

DANIEL B. TREFETHEN,
Attorney for Petitioner.

No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

ALFRED SHYMAN, doing business under the assumed name, business and style of ALASKA DISTRIBUTORS COMPANY,
Petitioner,

vs.

PHILIP B. FLEMING, Temporary Controls Administrator,
Respondent.

BRIEF IN SUPPORT OF PETITION

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In the Supreme Court of the United States

OCTOBER TERM, 1947

ALFRED SHYMAN, doing business under the assumed name, business and style of ALASKA DISTRIBUTORS COMPANY, *Petitioner*,

vs.

PHILIP B. FLEMING, Temporary Controls Administrator, *Respondent*.

No.....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF COURTS BELOW

The opinion of the United States District Court for the Western District of Washington was rendered May 20, 1946 (R. 813-824). The judgment of the Circuit Court of Appeals for the Ninth Circuit, affirming the lower court's opinion, was rendered August 15, 1947 (R. 837). The order denying Petitioner's Petition for Rehearing by the Circuit Court of Appeals was entered October 8, 1947 (R. 839).

JURISDICTION

1. The date of the judgment to be reviewed is October 8, 1947, when the Petition for Rehearing was denied by the Circuit Court of Appeals for the Ninth Circuit.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the

Code of Civil Procedure, as amended by 28 U.S.C.A., Section 347.

3. The questions involved in this case are of transcending importance concerning, as they do, the applicability and enforcement of the O.P.A. regulations. Also, the present decision of the lower court conflicts with decisions of other Federal Courts on Appeal, conflicts with applicable local decisions, has decided an important question of federal law not yet settled by this Court, and has decided a federal question in conflict with the decisions of this Court.

STATEMENT OF THE CASE

This case has already been stated in the preceding petition for the Writ of Certiorari which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals for the Ninth Circuit erred in affirming the order of the United States District Court and in refusing Petitioner's Petition for Rehearing.

ARGUMENT

SUMMARY OF ARGUMENT

1. The decision is at variance with decisions of other courts.

This decision holds that applicability of price ceiling to Petitioner's sale is a question of validity determinable *only* in the Emergency Court of Appeals. Other courts hold that such applicability to Petitioner is an interpretation of price regulations cognizable in the Enforcement Court.

a. Administrator himself fixed "dollars and cents" price of commodity in other jurisdictions by a written order, namely, in Alaska, Minneapolis, San Francisco, and Puerto Rico. Why not in Seattle?

b. Emergency Court of Appeals and other courts hold that construing a regulation is a matter for Enforcement Court.

2. The present decision has established an important question of local law in the State of Washington, contrary to applicable local decisions.

a. Under Washington liquor laws there cannot be any "domestic" liquor sale in Seattle by K & L Distributors to Petitioner.

b. The Washington State Liquor Control Board has *sole* power to determine that question and no O.P.A. official by an *oral* decision can interpret sales of liquor to Petitioner constituted "domestic" sale in Seattle.

c. Such *oral* interpretation by an O.P.A. official is unconstitutional as constituting a denial of due process of law.

3. The decision has decided an important question of federal law which has not, but should be, settled by this Court.

a. Decision admits two methods of determining price ceiling applicable to Petitioner's sales (1) "Price at which acquired" theory, (2) "Maximum Domestic Price" theory. Court states (1) is illegal, but (2) is legal.

b. Facts re "Maximum Domestic Price" theory,

c. Facts re "Price at which acquired" theory.

d. Decision should not apply retroactively a "dollars and cents" price ascertained *orally* at the time of the trial, to sales by Petitioner made three years prior thereto.

e. Courts are not bound by erroneous interpretations of the Administrator's agents.

f. Facts detailing Petitioner's attempts to ascertain Seattle interpretation of applicable ceiling price.

g. Protest proceeding to the Emergency Court of Appeals not applicable to this case. Price schedule must be in writing.

4. This decision conflicts with applicable decisions in this Court.

5. This decision erroneously holds that M.P.R. 194 concerning sales in Alaska, is not applicable to this case.

a. Applicable tax cases are analogous to the facts in this case.

6. "Good Faith" of Petitioner justifies a dismissal in this case.

a. District Court's decision on Petitioner's good faith.

b. Decision of Emergency Court of Appeals on good faith.

c. Decisions of other courts on good faith.

d. $18,020 loss, suffered by Petitioner's relying upon O.P.A.'s Price Attorney's interpretation of ceiling price.

e. Equitable principle applicable herein.

7. Administrator has no right to overturn established business practices.

8. Administrator should not be permitted to collect twice for overcharges upon the same transaction.

1. THE DECISION IN THIS CASE IS AT VARIANCE WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEAL.

The Ninth Circuit Court of Appeals in the present decision states "Another point urged" (by Petitioner) "is that in the absence of a written order or regulation establishing dollars and cents ceiling prices at Seattle no basis exists for the charge of price violation" (R. 833). * * * "A short answer to the argument is that it amounts to an attack on the validity of the regulation cognizable only in the Emergency Court of Appeals" (R. 834).

As asserted in that Court, this Petitioner did not make, nor is he now making, any attack upon the validity of the Second Revised Maximum Export Price Regulation (8 F.R. 4132). Our contention has always been that the Administrator utterly failed in this case to carry out his basic duty of establishing *any* price upon Tom Burns Whiskey, *in Seattle*, by an

order, regulation, or *price schedule* as required by Sec. 2(a) of the Emergency Price Control Act of 1942.

The Administrator himself established in Alaska on July 29, 1942, the "dollars and cents" method for commodities sold in Alaska.

> *In the Matter of Anchorage Grocery.* Opinion on Order Denying Protest, Docket No. 1288-2-P., April 6, 1945. 3 Opinions and Decisions of the Administrator, 3 O.P.A. Service, pp. 156-157;
>
> *In the Matter of Otto Kraft & Sons.* Opinion on Order Denying Protest, Docket No. 1288-3-P., May 12, 1945. 3 Opinions and Decisions of the Administrator, 3 O.P.A. Service, pp. 223-224.

As shown in the foregoing opinions, Maximum Price Regulation No. 288 was established for Alaska wherein specific dollars and cents values for each named commodity were designated. But the amendment to M.P.R. 288, setting specific dollars and cents values to Tom Burns Whiskey was not adopted for Alaska until May 23, 1944 (9 Fed. Register 5487), approximately a year after the sales and delivery of Tom Burns Whiskey by Petitioner to his Alaska customers.

Again, the Administrator followed that exact procedure in establishing the price of Tom Burns Whiskey in Minnesota, its place of manufacture. By the *Phillips'* decision (Order No. 3, Pltf's Ex. 2, R. 44) dollars and cents maximum prices *in that State* for Tom Burns Whiskey was *established. But no authorized official representing Appellee ever applied any*

formula to the establishment of a ceiling price for Tom Burns Whiskey in Seattle, by any written order.

The Ninth Circuit Court of Appeals fails to follow its own decision in *Martini v. Porter*, 157 F.(2d) 35, 40, wherein it should be noted that the order of the Administrator specifically sets a "dollar and cents value of $37.61 per case of Dunbar's Whiskey" (p. 38, footnote 5A), at San Francisco, California.

As the Court there said:

> "Before the district court could lawfully enter a judgment based on or involving the amount of overcharges, *it was necessary for the O.P.A. to enter this order.*" (p. 40)

(It should be noted that the Regional Administrator issued and promulgated the "dollar and cents" order during the course of the trial, such order to have a retroactive effect upon prior sales made by the Martinis (p. 38, footnote 5A). *But no such order was ever promulgated in this case, during the time of the trial or at any time prior thereto*).

This is a finding as to an ex post facto civil liability *based upon no order or regulation fixing prices.*

No stronger language could be used than that in this quoted case. Both the Regional Administrator Ben C. Duniway, by issuing his order fixing a dollar-and-cents price *during the trial*, and the court's recognition that no judgment could be entered until such an order was made, is a direct confirmation by that court of the correctness of Petitioner's contention herein. The record in our case shows that from the inception of negotiations to the present time, that has always

been one of the basic contentions made by Petitioner's counsel.

Petitioner has consistently contended that the refusal of the Regional Administrator at San Francisco, the refusal of Seattle Administrator Kraus, Chief Price Attorney Sholley and Enforcement Attorney Abernethy, to set a price *by any written order*—they failed to answer letters requesting a written interpretation—deprived him of his constitutional rights under the *Yakus* case, as argued hereinafter in this brief.

Thus, the *Martini* case established as law that which this Appellant has contended from the beginning, that *a written order must be made by the Administrator himself establishing a dollars and cents price for Tom Burns Whiskey in Seattle before any action for overcharges could be upheld by the Courts.* As Judge Denman said in his dissenting opinion, "For an 'overcharge' *there must be determined a prior* maximum price which the actual sales price was over" (p. 42). It is admitted that there was no *prior* maximum price in Seattle which had been *determined* in this case. Petitioner is insisting, rightly so he believes, that the interpretation of the Export Regulation *orally* upon the witness stand or otherwise by a subordinate of the Administrator unauthorized to make such interpretations, and the applications of the facts of the case to the Export Regulation, are erroneous and fallacious.

That "dollars and cents" prices established by the written order is a necessity, was likewise the procedure adopted by the Administrator and upheld by

the First Circuit Court of Appeals in a Puerto Rico case where a price per gallon of molasses at the place of delivery was established.

Anderson v. Mercado, 163 F.(2d) 303 at 306.

"Prices may vary on the same commodity in various localities throughout the United States and its Possessions."

Supak v. Porter, 158 F.(2d) 803 at 806;

Hawaii Brewing Co. v. Bowles, 148 F.(2d) 346 at 850(5) (Em. App.);

Fleet v. Bowles, 142 F.(2d) 559, 564(1) (Em. App.)

The present decision differs materially from the Emergency Court of Appeals wherein such Court states:

"The complaint nowhere challenges the validity of the formula in M.P.R. 165, which establishes the complainant's maximum prices on the basis of the highest prices charged in March, 1942. All that is involved is a dispute as to the amount of those prices. What is sought by the complainant is an adjudication by this court as to *what were the maximum prices* to which he was subject during the period of his alleged violation. This is a question the determination of which in no way involves the validity of the regulations but merely its application to the facts of complainant's case. It is, therefore, a question with which the district court not only *may but must* deal in determining whether the complainant is guilty of a violation of the act. * * * Since there is no issue raised over which this court has jurisdiction a judgment will be entered dismissing the complaint."

Belkin v. Fleming, 161 F.(2d) 197 at 198-199 (E. Ct. of App.) (March 27, 1947).

The Emergency Court of Appeals, again asserts "complainant's remedy in respect to interpretation rests in the District Court and in reviews in accord with appropriate statutes ((2) page 762) * * *. "Our jurisdiction, so defined, does not include power to determine mere questions of interpretation or applicability" (p. 762(3)).

Collins v. Bowles, 152 F.(2d) 760 at 762 (E. Ct. of Appeals).

"The seller is perfectly free to resist in the enforcement court the Administrator's assertion of a claimed discrepancy. * * * The Administrator said in his opinion: 'The Administrator is of the opinion that the practices of the Enforcement Department are irrelevant and immaterial to the determination of whether the Regulation is valid. The propriety of the Enforcement Department practice of *which protestant complains is not a subject for consideration in a protest proceeding*. It is, rather, one for determination by the enforcement court * * *.

"Again, we think, complainant misconceives its remedies. Whether complainant has complied with or violated the regulation; whether it has subjected itself to liability for damages and if so, how much, are questions for the enforcement court. Congress endowed this court with no jurisdiction to determine whether a regulation is applicable to complainant or to *interpret or construe it*, so far as enforcement is concerned. Our only province in that connection is, in reviewing issues of validity. * * * Here there is no

question that complainant is subject to the regulation;over and beyond that *arises the question as to the proper interpretation of the regulation when applied to complainant's acts—something we are not authorized to decide but of which the enforcement court has complete jurisdiction.* That is matter bearing in no wise upon the question of validity but which may become most material in the enforcement action. Whether under the regulation properly interpreted, complainant has violated it and subjected itself to damages and if so the proper measure thereof is wholly for the enforcement court bearing in mind that the statute forbids more than treble damages and that those are justified only under certain specific circumstances. * * * Their interpretation as applied to complainant and complainant's rights and obligations is for the enforcement court."

Darling & Co. v. Fleming, 158 F.(2d) 387 at 388, 389, 390 (E. Ct. of App.).

"Interpretations are not protestable * * * but appellant was free to question the propriety of these interpretations in district courts and the Circuit Court of Appeals had full power to pass upon the proper meaning of the regulations then sought to be interpreted."

Taylor v. Porter, 156 F.(2d) 805, 811(11) (E. Ct. of Appeals).

"Moreover, it should be noted that the complainant was free to question the propriety of these interpretations in the District Court, and that the District Court and the Circuit Court of Appeals had full power to pass upon the proper meaning and application of the regulation, thus sought to be interpreted by the Administrator."

Taylor v. Porter, 156 F.(2d) 805 at 811(11) (Emergency Court of Appeals).

"We cannot, however, condone the way in which the complainant by means of the issuance of this admittedly invalid order has been prevented for nearly a year from securing a judicial determination of the question of law which the Administrator now concedes is involved in its case. Unfortunately we cannot decide that question in this case, but the way is now open for the Municipal Court or any other court before which the question properly arises to determine the complainant's maximum rent by applying the regulation to the admitted facts. In so doing the court will, of course, be required to determine the operation and effect of the regulation *by interpreting its provisions*, if necessary."

Fasons Realty Corporation v. Bowles, 146 F.(2d) 499 at 500 (U.S. Emergency Court of Appeals, November 17, 1944).

Although the case was decided on other grounds, the fact that "price schedules"—O.P.A. Act of 1942, Sec. 2—meant fixing a dollars and cents price at the place of sale of the commodity, was fully recognized by the Administrator, wherein by amendments to the general price regulation—containing the "formula," by the way—a specific price of 13 cents per gallon was fixed at the place of delivery for molasses sold in Puerto Rico. Such "dollars and cents" amendments were made on September 12, 1944, and December 7, 1944, for molasses delivered *thereafter*.

Anderson v. Mercado (C.C.A. 1, August 25, 1947) 163 F.(2d) 303 at 306.

The Ninth Circuit Court of Appeals itself has taken jurisdiction to construe a regulation, even though the O.P.A. Administrator had contended that the validity of the regulation was thus being questioned and the Emergency Court had sole jurisdiction.

Bowles v. Case, 149 F.(2d) 777 at 778(1).

As set forth hereinbefore, the Administrator has established by a written order a *local* "dollars and cents" *price schedule*, for individual commodities in such widely scattered jurisdictions as Alaska, Minneapolis, San Francisco, Puerto Rico, with such rule being made applicable to all other jurisdictions in the Continental United States. Why, then, should not such rule be applicable in Seattle? Why rely upon an *oral* interpretation made at the time of the trial in March, 1946, three years after the sale had been effectuated in this case on April 5, 1943? Either the acceptance of such *oral* interpretation by the lower courts is wrong, or the written orders fixing dollars and cents values in the other jurisdictions are erroneous if the present decision is held legally sufficient. At least, this Court should determine the conflicting decisions.

2. THE NINTH CIRCUIT COURT OF APPEALS, IN THE PRESENT DECISION, HAS ESTABLISHED AN IMPORTANT QUESTION OF LOCAL LAW OF THE STATE OF WASHINGTON IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

Petitioner under Rule 38 has the undoubted right to be heard by this Court when the present decision

conflicts with the decisions of the courts of the State of Washington.

This Petitioner was the instrumental cause in having the Supreme Court of the State of Washington uphold the doctrine that there could be no "domestic" sales of liquor in the State.

> *W. J. Lake & Co. v. King County* (Alaska Distributors as *Amicus Curiae*) 3 Wn. (2d) 500; rehearing 4 Wn.(2d) 651, certiorari denied 311 U.S. 715.

The present decision holds that Kessler & Levine, doing business as K & L Distributors, *sold and delivered* the liquor in this case, to Alfred Shyman, doing business as Alaska Distributors Company, in the City of Seattle, State of Washington; that such sale *and delivery* constituted a *domestic* sale in said State of Washington, and that thereby a Seattle "*domestic*" price was the established price upon which Petitioner Shyman must base his figures to his customers in Alaska; and that by such circumstances Petitioner Shyman became an "exporter" from Seattle to the Alaska business locations of his customers.

Under the basic law of the State of Washington it is provided in Section 23-J (Shyman's Exhibit S. 22) Pamphlet of the Washington State Liquor Act:

> "A liquor importer's license may be issued to any qualified person, firm or corporation, entitling the holder thereof to import into the State any liquor other than beer; * * * to store the same within the state; *and to sell and export the same from the state;* * * *"

In accordance therewith K & L Distributors had

the right under their Importer's License to import such liquor. But K & L Distributors' duty under the law was to "*sell and export the same from the State.*" There could be no break in the "current of commerce" by the ORAL declaration of an O.P.A. official that the liquors had come to rest in Seattle whereby a "domestic" price would be applicable thereto.

Under the 21st Amendment to the United States Constitution the State of Washington had the undoubted right to insist that no liquors could be sold within the State except under such conditions as it prescribed. The sole control of the liquor while within the confines of the State was entirely within the powers of the Washington State Liquor Control Board, and such liquors were always subject to the rules and regulations of such Board. Under such regulations the Washington State Liquor Control Board had provided (Section 89, Shyman's Exhibit No. 22, p. 93) that such liquor must be stored in a storage warehouse under the Board's control and that "no liquor shall be removed from any storage warehouse except for sale or delivery to the Board *or for export from the State*" (Section 97, Shyman's Exhibit No. S.22, page 94).

Under the law of the State of Washington, therefore, Appellee's ORAL interpretation that there was a "domestic sale at Seattle" and that K & L Distributors sale was not an export sale should not be upheld by this Court.

It may be that if the O.P.A. officials had established a price at Seattle of the Tom Burns Whiskey in

this case by any *written order or written interpretation*, there might have been presented the question as to whether the O.P.A. under its war time powers had the precedent right to establish prices in the State of Washington without the acquiesence of the Washington State Liquor Control Board. But, assuredly under the facts of this case wherein such *local* sale in Seattle was being asserted only by oral interpretation of O.P.A. officials, the undoubted right of the State to insist *that there can be no sale except for export purposes*, should be upheld by this and other courts.

As was said hereinbefore, it was not one of the purposes of the O.P.A. Act of 1942 to permit the Administrator to say *orally* that Appellant's purchase was a "domestic" sale. The Administrator's *only* power was to fix prices.

> *Collins v. Fleming*, 159 F.(2d) 431, at 437, 438, 439; certiori denied 67 S. Ct. 1094, April 7, 1947.

The Supreme Court of the United States in its decisions in recent years has invariably upheld the right of the State to control the sale of liquor within its borders under the 21st Amendment to the Constitution of the United States.

Mr. Justice Brandeis states that the 21st Amendment confers "upon the state the power to forbid all importations which do not comply with the conditions which it prescribes" (62 * * *). A classification recognized by the 21st Amendment cannot be deemed forbidden by the 14th Amendment (equal protection clause) (64 * * *). To say that, would involve not a

construction of the (21st) Amendment, but a rewriting of it (62 * * *).

State Board of Equalization v. Youngs Market Inc., 299 U.S. 59, at 62, 63, 64.

Mahoney v. Joseph Triner Corporation, 304 U.S. 401, at 403, 404.

"The substantive power of the State to prevent the sale of intoxicating liquor is undoubted * * *. Since the 21st Amendment, as held in the *Young* case, the right to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce clause and * * * discrimination between domestic and imported intoxicating liquors, is not prohibited by the equal protection clause." (394)

Indianapolis Brewing Company v. Liquor Control Commission, 305 U.S. 391 at 394.

Joseph S. Finch & Company v. McKittrick, 305 U.S. 395, at 397, 398.

(Justice Reed):

"The State of Virginia 'could conclude * * * that she could not safely permit the transportation of liquors through her territory by those who concedely mean to break Federal Laws (138)."

* * * * * * * * * * *

(Justice Black):

"The 21st Amendment has placed liquor in a category different from that of other articles of commerce * * * this much is settled; local, not national, regulation of the liquor traffic is now the general Constitutional policy (138) * * * Virginia seems to think that, unless adequate protectionary regulations are devised and enforced, liquor shipments ostensibly being trans-

ported through her territory to a neighboring state could be diverted to bootleg purposes contrary to her laws (139)" * * *

(Justice Frankfurter):

"The 21st Amendment prohibits the 'transportation or importation into any State * * * of intoxicating liquors in violation of the laws thereof,' not when the liquor is for delivery and use but 'for delivery or use therein.' In other words, liquor need not be intended for consumption in a State to be deemed to be imported into the State and therefore subject to control by that State (141) * * *. Since Virginia has power to prohibit the importation of liquor within that Commonwealth, it may effectuate that purpose by measures deemed by it necessary to prevent evasion of its policy by pretended through shipments. In a word, having the power to prohibit liquor from coming into a State, a State may take measures against frustation of that power (142) * * *

Carter v. Commonwealth of Virginia, 321 U.S. 131 at 137-138.

Justice Frankfurter has stated:

"Price fixing is a restraint upon trade." * * * "The 21st Amendment subordinated the Commerce Clause to the power of the state to control, and to control effectively the traffic of liquor within its borders (300) * * * as a matter of constitutional law, the result of the 21st Amendment is that a State may erect any barrier it pleases to the entry of intoxicating liquor (300) * * * If a state for its own sufficient reason deems it a desirable policy to standardize the price of liquor within its borders either by a direct price fixing statute or by permissive sanction of such price fixing in order to discourage the

temptation of cheap liquor due to cutthroat competition, the 21st Amendment gives it the power and the Commerce clause does not gainsay it." (301) * * *

U.S. v. Frankfort Distilleries, 324 U.S. 204 at 301.

Justice Jackson recites:

"These clauses of the 21st Amendment create an important distinction between state power over the liquor traffic and state power over commerce in general. The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular constitutional provision. * * * It was their unsatisfactory experience * * * that resulted in giving an exclusive place in constitutional law as a commodity whose transportation is governed by a special constitutional provision 398, 399 * * *. So the 21st Amendment made the laws as to delivery and use in the state of destination the test of legality of interstate movement. This obviously gives to state law a much greater control over interstate liquor traffic than over commerce in any other commodity.

"If the 21st Amendment is not to be resorted to for the decision of liquor cases, it is on the way to becoming another 'almost forgotten' clause of the Constitution." (390) * * *

Duckworth v. State of Arkansas, 314 U.S. 390, at 398, 399.

"There can be no delivery to one not authorized to receive liquor."

Ziffrin Inc. v. Reeves, 308 U.S. 132 at 140 (12).

"The decisions of the Supreme Court since the

> adoption of the 21st Amendment recognize the practically unlimited power of the state to regulate or prohibit the transportation of alcoholic beverages, irrespective either of the commerce clause or the equal protection clause of the Constitution (966) * * *. Interstate Commerce in liquor, *not in violation of state laws*, was left matter of national concern (967) * * *. The broad theory of the Sherman Act — that trade should be free of artificial restraints — is in many respects incompatible with the policy of state liquor control legislation; and wherever such conflicts exists the Sherman Act must give way, just as the Commerce Clause itself gives way in identical circumstances. Where invocation of that Act tends to hamper or interfere with the enforcement of State Laws regulatory of the transportation or importation of intoxicants, the *Act* is *unenforceable*. By the terms of its own fundamental law the national government has disabled itself from prosecuting as an offense that which a state has commanded or implicitly encouraged as a means of controlling the traffic of intoxicants within its borders." (968(3))
>
> *Washington Brewers Institute v. United States*, 137 F.(2d) 964 at 966, 967, 968.

Again, it should be reiterated, that the O.P.A. under its war powers may place a maximum price upon "legal" or "illegal" whiskey. But we are contending herein that when the State of Washington has declared that a "domestic" sale of whiskey cannot be made within its boundaries no unauthorized official of the O.P.A. by an *oral* interpretation and without a written order or regulation, and with no written

price fixing, may declare that such transaction is a *sale in the state*—whether legal or illegal.

Other decisions of the Supreme Court seem applicable to the facts of this case.

The war power of the United States, like its other powers, is subject to applicable constitutional limitations.

> *Hamilton v. Kentucky Distilleries & Warehouse Company*, 251 U.S. 146 at 155 (Mr. Justice Brandeis).

A defendant in an enforcement proceeding has the right to challenge, on constitutional grounds, whether or not a procedure has been "properly interpreted."

> *Case v. Bowles*, 327 U.S. 92, at 98(7).

> "Where the method pursued by the Department is fundamentally erroneous it constitutes a denial of due process of law and the courts do not have to uphold the interpretations of department officials."
>
> *N.P. Ry. v. Dept. of Pub. Wks.*, 268 U.S. (80 L. ed.) 836 at 839 (Wash.);
>
> *C.M. & St.P. Ry. v. Pub. Util. Cm.*, 27 U.S. (71 L. ed.) 1085 at 1090.

> "The idea which is now sought to be read into the grant by Congress to the Administrator * * * is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it. After all, legislation * * * is addressed to the common run of men and is therefore to be understood according to the source of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

Addison v. Holly Frost Products, 322 U.S. 607 at 618(6).

The lower court's decision stated that the Administrator has set forth his intention in a Statement of Considerations:

> "Such Statement of Considerations is only prima facie correct, but such presumption falls upon the introduction of evidence to the contrary. Here, all of the evidence of the complainant was specific, supported by exact references to actual experience, and squarely contradicted the declarations of fact in the Statement of Considerations. We are of the opinion that complainant's evidence overcame the presumption of correctness that attaches to the Administrator's Statement of Considerations."

> "(4) From the foregoing, our conclusion follows that price differentials based upon differences * * * as far as appears from the evidence before us, were established on a fallacious basis, and were unjustified * * *. They were, accordingly, arbitrary classifications, and as such are invalid. A judgment will be entered setting aside Sec. 1396.214(a) of Max. Pr. Reg. 203, which fixes maximum prices for Vitamin A * * *."

Halibut Producers' Cooperative v. Porter, 157 F.(2d) 332 at 336(1)(2);

S. Roggen & Co. v. Fleming, 159 F.(2d) 707 at 711.

Such language is very applicable to this case wherein arbitrary oral interpretations have been promulgated by unauthorized sub-agents.

If the present decision is upheld all commodities in the flow of commerce through the State of Wash-

ington to and from Alaska will be subjected to the taxes of the State contrary to the commerce clause of the United States Constitution. The far reaching effects of the upholding by the lower courts herein of the *oral* interpretation by O.P.A. officials that the sale in this case was a "domestic" sale, apparently was given no consideration by those courts. Petitioner respectfully represents to this Court that unconstitutional deprivation of established rights should not be held to be the law of the land.

3. THE DECISION HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT, BUT SHOULD BE, SETTLED BY THIS COURT

The Ninth Circuit Court of Appeals in its decision states (R. 832) "During the time in question" that is, at the date of the sales in April-August, 1943—"the Second Revised Maximum Export Price Regulation (8 F.R. 4132) was in effect. *The sales were at prices in excess of those determinable under that Regulation*" * * * "Section 3(a), (1) of the Regulation provides in part '(a) In the case of an exporter * * * the maximum price shall be (1) The price at which a commodity was acquired or the maximum domestic price which would be applicable to a current sale of the commodity to the exporter by the supplier thereof * * *.' It is insisted that the court erroneously based its determination of an overcharge on the maximum price alternative, and did not take into consideration appellant's cost of acquisition. This argument is predicated on the fact that appellant, if an exporter, *concededly paid above-ceiling prices to his suppliers*

* * * Assuming that appellant was free to elect either basis for computation of his price, it seems plain that the phrase 'the price at which the commodity was acquired' cannot fairly be construed to include an over-ceiling price. The rational interpretation of the provision is that *it has reference to an acquisition cost not violative of law*" (R. 834-835) (Italics ours).

The italicized portions above set forth indicate that the Circuit Court of Appeals in its decision procedes on the false premise that Petitioner "concededly paid above ceiling prices to his suppliers." Thus, according to that court and opposing counsel, there was no alternative method but merely the one method of ascertaining the "maximum domestic price" under the formula of the Regulation.

Prior to arguing the "price at which acquired" alternative, let us examine the "maximum domestic price" theory which the lower court uses as a determination of the "concededly payment of over-ceiling prices to his suppliers."

May we advert to facts proved at the trial.

As a means of informing the Court, as well as establishing for purposes of defense the Petitioner's choice of the alternative price named in said Sec. 3 (a) (1) of the Regulation, a Pre-Trial Motion was interposed by Petitioner that the Respondent (plaintiff) more definitely state the formula intended to be followed by him in establishing the basic price in Seattle upon which Respondent intended to rely at the trial of the case (R. 11-12). But such motion was denied by the Court and it was not until the actual

trial occurred that the claimed dollars and cents price of Tom Burns whiskey in Seattle was made a subject of oral proof on the witness stand. At no time was there any proof that any written interpretation of the Regulation had been made by any authorized O.P.A. official. At the time Respondent rested his case (R. 575) his counsel had assumed that by taking the prices of Tom Burns whiskey as fixed by Order No. 3 in Minneapolis, "it was merely a matter of mathematical calculation to determine the domestic price in Seattle by following the formula set forth in Section 3 (a) (1), Section 4 (a) (b), and Section 5, of the 2nd Rev. Max. Exp. Pr. Reg."

After all the testimony by both sides had been presented, and arguments had been concluded by respective counsel, the obfuscation not only of the Court (R. 751) but of all counsel as to what constituted a domestic price in Seattle was such that over objections of Petitioner's counsel the Court reopened the case to permit Respondent (plaintiff) to introduce so-called expert witnesses to testify orally as to the elements making up such alleged price structure (R. 711-774) constituting the alleged Seattle price. But it was admitted by Respondent's (plaintiff's) counsel that such testimony was limited to the "maximum domestic price" which is the alternative provision in Sec. 3 (a) (b) of the 2nd Rev. Max. Ex.Pr. Reg. (R. 737, 738, 753) and IN NO MANNER SOUGHT TO INTERPRET THE FIRST ALTERNATIVE "the price at which the commodity was acquired" designated in such Regulation.

That it was not a case of "mere mathematical computation" as asserted by Respondent's (plaintiff's) counsel, but a most complicated compilation, not understandable even by Respondent's (plaintiff's) expert technicians, was clearly demonstrated by Petitioner's counsel on the stand as a witness (R. 797-811). Using a compilation filed as Shyman's Exhibit, S. 30, the alleged overcharges as claimed by Seattle O.P.A. officials—who computed *orally but never in writing*—as being based upon the "maximum domestic price at Seattle" in accordance with the formula of the Regulation, had a price range of thousands of dollars. Epitomized, the alleged overcharges were alleged by the named experts to be as follows:

John B. Sholley, Chief Price Attorney at Seattle (R. 799, 800)	$53,708.485
Fletcher H. Burrus, Chief Price Investigator at Seattle,	
1st computation (R. 602-603)	27,058,60
2nd " (R. 800)	31,233.45
LeRoy Mather and Richard Rathbun, Enforcement Attorneys from Washington, D.C. (R. 801)	29,225.856
Overcharges named in Plaintiff's Original Complaint (R. 801)	29,251.45
Miss Jane Sue Abernathy, Chief Deputy Enforcement Attorney at Seattle, (R. 801)	53,708.485
Joe S. Pearson, Chief Trial Attorney, Pre-Trial Order (R. 801-802)	31,671.25

Patrick A. Geraghty, Chief Price Attorney at Seattle at the time of trial, and testifying on the stand (R. 802).... 21,809.89

Patrick A. Geraghty, if $1.25 was added to basic price and mark-up allowed thereon (R. 802-803)..... 19,542.12

Certainly no more potent argument can be presented for the establishment of a "maximum domestic price at Seattle" *by a written interpretation* than is shown by the foregoing figures. Where so-called experts can render opinions based upon the same facts and making use of the same formula (R. 797-803) alleging overcharges ranging from $19,542.12 to $53,708.48, then it certainly seems as if a necessity existed for a written interpretation by some authorized O.P.A. official which should have established a dollar and cents maximum domestic price at Seattle for Tom Burns whiskey.

The lower court adopted the total overcharge figures as testified to by O.P.A. Price Attorney Geraghty. But this Petitioner respectfully directs the attention of this Court to a further reduction, agreed upon as being 33 cents per case for 6689 cases, or a total of $2,266.77, which should have been further deducted, making the claimed overcharge the sum of $19,541.12, instead of the sum of $21,809.89 as found by the lower court (R. 802-803).

Such difference in price is due to the fact that Witness Geraghty did not add to his idea of a basic price under Sec. 4 of the Regulation, a mark-up of 25% on the $1.25 per case allowable for expenses under Sec.

4 (b) or the said agreed sum of 33 cents per case (R. 757-759).

But the Administrator himself in his opinions states "To the maximum price in Seattle, Washington, an amount equal to freight, marine insurance, and war risk insurance was added"—these items in our case constituted the agreed sum of $1.25 per case—"which represented the direct cost to Alaska merchants. *Average wholesale and retail mark-ups for Alaskan dealers were then added to such direct cost.*" Otherwise saying, the $1.25 per case should have been added to the figures which Witness Geraghty testified to, and the 25% mark-up *then* allowed on such total, or the further sum of 33 cents per case, making a total further deduction of $2,266.77 from the lower court's figures on overcharges above designated.

In the Matter of Anchorage Grocery, supra, 3 O.P.A. Opin. & Dec. 156 at 157;

In the Matter of Otto Kraft, supra, 3 O.P.A. Opin. & Dec. 223 at 224.

Even counsel for the O.P.A. found the problem so difficult to understand that he was compelled to rephrase and restate his hypothetical facts (R.752-753).

Furthermore, the wholesale jobber in this case was Stuart and Williams in Chicago and the element of "freight from the rectifying plant or freight basing point from which shipment is made to the receiving point of the particular wholesale jobber" was not taken into consideration by Witness Geraghty, nor

was any proof submitted that there was no such freight item (R. 722-723). Thus, an element recited in the Regulation as a part of the formula, being not included in the so-called maximum domestic price testified to by the witness, renders nugatory the price designated by him.

At this point, it must again be emphasized that Respondent's (plaintiff's) interrogation of his expert Price Attorney Geraghty was predicated entirely on the use of the maximum domestic price theory and not on the cost of acquisition theory (R. 737, 757).

Respondent (plaintiff) gave no testimony whatsoever upon the first alternative in Sec. 3(a)(b) of the Regulation, namely, "*The price at which the commodity was acquired.*" Not only is that the first alternative stated in the said section of the Regulation, but it is the logical starting point for determining the Seattle price of Tom Burns whiskey, in the opinion of the Petitioner.

At the outset let it be asserted without any fear of contradiction, *there has been no written opinion, order, regulation nor interpretation*, by any authorized official of the O.P., printed in the Federal Register, stating a definition of "the price at which the commodity was acquired." The wording of the alternative is so clear that it would seem that no explanation, or interpretation of the phrase should be necessary.

The fact was exemplified in the correspondence which distributors of liquors in Alaska had with the local officials of the O.P.A. prior to the transactions here in question. Under date of July 21, 1942—al-

most a year prior to the transactions here in question —Mr. John B. Sholley, Chief Price Attorney, wrote a letter to the Alaska Distributors Co., Petitioner herein, in which he said "The Regulation permits you to fix your maximum price by taking your *cost of acquisition*" plus certain additional items to make up his "landed cost at Seattle". Evidently, Mr. Sholley accepted the phrase in its literal meaning. This has been the customary business practice in the Alaska liquor trade from Seattle since 1934 (R. 581-582).

Such letter was followed by a letter on November 2, 1942 to Odem-Edwards Co. from Clinton Hartson, O.P.A. attorney (later Seattle Administrator), by Muriel Mawer, Price Attorney, which letter was made known to all the trade, in which it is stated "You have followed the custom in the pricing of merchandise which you sell to purchasers in Alaska of adding *to your cost of acquisition*, a fixed percentage mark-up . . ." (R. 583-585) There seemed to be no ambiguity existent in the mind of the O.P.A. attorney as to what constituted the "cost of acquisition."

Then on December 10, 1942, a letter was written by Petitioner in which he described in detail his methods of doing business in the distribution of liquors in Alaska, stating "We construe that we are within our rights to add our regular margin of profit *to our landed cost.*"—hereinabove described as being in force since 1934——"to arrive at our selling price to dealers in Alaska. In our opinion, which has been affirmed by the Superior Court of King County, the Supreme Court of the State of Washing-

ton, and a refusal to review of the case by the Supreme Court of the United States, *our stocks are not intended for domestic sale* but are maintained here for the purpose of shipping which in our case is to Alaska only as that is the only place we are licensed to do business . . . *Under the Steele Act of the State of Washington, nobody is allowed to do any liquor business in the State* . . . and such being the case, ourselves as well as our competitors, *must rightfully be considered as not doing any domestic business.*" This detailed letter to Robert A. Nelson, Alaska representative of the O.P.A., reciting the customary business practices of the trade in Seattle, and particularly the "landed cost in Seattle," was acknowledged and acquiesced in by Mr. Nelson (R. 587-588-589).

Similar letters to the Pacific Bottlers Supply Company from the O.P.A. officials dated respectively Feb. 25, 1943 and March 24, 1943, and made known to all the trade, set forth the customary business methods, including the cost of acquisition (Shyman's Exs. S. 10, S. 11; R. 589-591).

Thus, months prior to the adoption on April 5, 1943 of the 2nd Rev. Max. Exp. Pr. Reg., the distributors of liquors in Alaska, having offices in Seattle, and the Seattle O.P.A. officials had a clear and factual knowledge of the meaning of "the price at which the commodity was acquired" which meaning had been the accustomed business practices of the trade since 1934 (R. 646-648).

The dollars and cents "price at which the commodity was acquired" at Seattle was set forth in detail by

Petitioner (defendant) (R. 606-607). Argument at length on the theory of such term was indulged in by counsel for all parties (R. 746-747, 749-750, 756-757).

It was conceded by Respondent's Expert Price Attorney that there was no written order on file in Seattle establishing the dollars and cents price of Tom Burns whiskey between April 1, 1943 and September 1, 1943 (R. 762-763, 786).

In a one-page Summary (Shyman's Ex. S. 30, R. 793, 798), Petitioner (defendant) showed the exact prices at which he sold the Tom Burns whiskey to his dealer customers in Alaska, and what the ceiling prices were in Seattle, taking for his basis "the cost at which the commodity was acquired." Such phraseology is analagous to the wording of M.P.R. No. 194, applicable to the commodity sold to Alaska buyers, wherein the cost is described as "direct cost to the buyer of the commodity sold" (R. 798). Under such Summary the computation shows that under the "cost at which the commodity was acquired" alternative in Sec. 3(a)(1) of 2nd Rev. Max. Ex. Pr. Reg., Petitioner sold at $20,745.385 *under* the correct ceiling price (Shyman's Ex. S. 30. p. 2) as contrasted to an *overcharge* of $21,809.85 as testified to by Witness Geraghty under "the maximum domestic Price" computation (Shyman's Ex. S. 30, last page).

That the formula in Sec. 3(a)(1) of 2nd Max. Ex. Pr. Reg. is not a matter of "simple mathematical computation" but is a difference of approximately $42,000—an *under* ceiling price charge of $20,745.38 if Alternative No. 1 is interpreted; or an *overcharge*

of $21,809.89, if Alternative No. 2 is chosen—thus appears from the evidence of the respective parties. Again, such factors conclusively demonstrate that in order to be binding upon this Petitioner there should have been established in this case the proof by Respondent (plaintiff) that some written order, regulation, opinion, or interpretation has been promulgated under O.P.A. Revised Procedural Reg. No. 1, Amendment 1, by some authorized O.P.A. official, and published in the Federal Register, establishing dollars and cents figures for sale of Tom Burns whiskey in Seattle.

Contrary to the Court's assertion that Petitioner could not pay "an over-ceiling price to his supplier" nowhere in the record is there any order, regulation, interpretation, or price schedule, which determined what the real price ceiling in Seattle was at the time of this purchase from K & L Distributors by Petitioner was made. Therefore, in the absence of any such price, there is nothing to show what constituted the 'over-ceiling' claimed by the lower courts herein.

It was not until April 11, 1944,—practically one year after the sales in the present case—that the phrase "price at which acquired" is interpreted to mean "the price paid for the commodity is no higher than the suppliers ceiling" (Regulation 194, Amendment 12; Shyman's Ex. S. 1; R. 44). Thus, the lower court is using its hindsight at the trial three years after the sale in order to provide an interpretation not to be found in any of the definitions of the Administrator existent at the time of the transaction.

No definition of the phrase "price at which the commodity was acquired" is contained in the 2nd Rev. Max. Ex. Pr. Reg's. Section 11 of such Regulation sets forth definitions of all terms needing clarification, but evidently the Administrator deemed the meaning so clear and simple that no definition or interpretation thereof seemed necessary (R. 535). The statement of considerations accompanying such Regulation made no reference to the claimed interpretation (R. 563).

There is no rule, regulation, opinion, nor written interpretation, by any authorized O.P.A. official, defining what is meant by the term "illegal price." In this case no official of O.P.A. has ever rendered a written opinion that the price at which Petitioner procured the Tom Burns whiskey was in any way illegal (R. 538). Witness Geraghty's testimony merely interpreted the "maximum domestic price" alternative and not the "price at which the commodity was procured" alternative in the Regulation (R. 749).

Petitioner is charged with *selling* at an above ceiling price *in Alaska*, by Respondent's complaint. But no charge was made in Respondent's complaint that Petitioner had *purchased* at an "illegal" price (R. 538).

No interpretation was published in the Federal Register, as required by law in order to attribute to a merchant knowledge of the provisions of such interpretation (R. 538, 553-556). Petitioner personally never had any knowledge of such an interpretation (R. 619).

Under Revised procedural Regulation No. 1,

Amendment 1, issued March 16, 1943, "official interpretations shall be given only in writing, signed by one of the following officers of the Office of Price Administration * * *."

It is significant that 2nd Rev. Max. Exp. Pr. Reg., under which defendant is charged as committing a violation, was adopted on *March 30, 1943*, and published on April 5, 1943, and there is no reference therein to such interpretation (R. 550, 561, 563). It would have been a simple matter to insert the word "legal" in the context of Sec. 3(a)(1) to read "The (legal) price at which the commodity was acquired," if the Administrator had intended to bar Petitioner, or others. Or, reference could have been made to the "supplier's ceiling" as was done with M.P.R. No. 194, Am't. 12, on *April 11, 1944. But at no time has the Administrator made a regulation interpreting such phrase.*

Interpretations by the Administrator are not given the force of law; only regulations have such force. The phrase should be given its ordinary common sense definition.

Bowles v. Wilson & Co., 63 F. Supp. 687 at 689;

Bowles v. Jung, 57 F. Supp. 701 at 706-707.

The burden should not be placed upon the Court of acting as an umpire as to which is the correct set of figures to be used, nor should the Court be compelled to work out the dollars and cents figures from an obscurely worded formula capable of so many misinterpretations by experts. *That duty is one for the Administrator to establish by affirmative proof.*

The Statement of Considerations accompanying the filing of the 2nd Rev. Max. Exp. Pr. Reg. effective on April 5, 1943 (R. 561) made no reference of any kind to the claimed interpretation.

By Shyman's Ex. S.28 (R. 568, 572, 574) it was proven that not until May 2, 1944—several months subsequent to the sales in this case—was the term "price at which the commodity was acquired" interpreted by the Max. Pr. Reg. No. 445, in the following statement:

> "Regulations establishing export prices use for that purpose the 'price at which the commodity was acquired' by the particular seller. *Export sales have been a favorite device of persons seeking to avoid loss resulting from over-ceiling purchases.* To prevent such avoidance of this regulation, Article VII provides that in determining the price at which a seller may export a commodity, his net cost, figured according to the accompanying regulation, shall be deemed the 'price at which the commodity was acquired'." (R. 568)

This passage more than offsets such interpretation as given by the lower court.

Thus, between *April 5, 1943* and *May 2, 1944*, which was the period during which Petitioner's sales were made, there was no existent interpretation, opinion, rule, regulation, or definition, by any O.P.A. official of record in *any* publication, stating that "price at which a commodity was acquired" had any other meaning than the plain meaning which had been existent in the trade since 1934 (R. 580-583). Shyman's Exs. S.7, 8, 9, 10, 11 (R. 45-46) (R. 647-648, 698-700, 704-705-706, 536-537).

The United States Supreme Court has held that where "standardized" price control was not in effect between date of a Congressional amendment—July 16, 1943—and the date when the Administrator made a new interpretation—September 11, 1943—the case must be dismissed.

As stated by Mr. Justice Frankfurter:

> "Congress gave power to standardize; it did not stereotype *past* standardizations * * * *The Amendment contained no saving clause that all outstanding standardizing regulations were to be deemed continuingly valid, nor is there any intimation warranting such an implied limitation* * * * (p. 886 hdnote 4, 5) * * *. This is too substantial a qualification to be made by judicial interpolation * * *. But the accommodation of the various interests involved in a system of price control are for Congress and not for us, and we must construe its legislation as fairly as we can do catch the will behind the words."
>
> *Thomas Paper Stock Co. v. Porter*, 66 S. Ct. 884, 886-887.

The quoted word "illegal," should not be read into the regulation by construction of the court whether the Administrator could have so provided,—as he did in the subsequent regulations—need not be considered, since he did not, in fact, so provide.

> *U.S. v. Phelps Dodge Mercantile Co.*, 157 F.(2d) 453, 456(3).

But the lower court should not apply, retroactively, its after acquired knowledge. It should be reiterated that the only interpretation into "dollars and cents" of the "maximum domestic price" theory occurred at

the time of the trial of the case approximately three years (March, 1946; R. 714) after the sale of the commodity in April-September, 1943 (R. 38, 619). It is in the record (R. 714) that there is nothing in M.P.R. 193, and Order No. 3 which "is a dollar and cents order, duly filed, that fixes the price—dollars and cents or otherwise — of Tom Burns Whiskey *either in Seattle or for export from Seattle*, and it is conceded by the Pre-Trial Order that there is no price fixed in Alaska."

In the present case, therefore, the lower courts in this case have taken an oral "dollars and cents" interpretation and related the price back three years with a theory—maximum domestic price—entirely different than the theory—price at which acquired—in practice at the time of the sales.

It should be noted again, that the usual trade practice from 1934 to the time of trial of this case in the District Court, was to use as a basic price "the price at which acquired" doctrine, adding thereto the usual transportation and analagous costs and the 20% trade markups. This was confirmed by letters of the administrative O.P.O. officials in the Alaska and Seattle offices of the O.P.A. (Shyman's Exs. S.16-20, R. 582-590). It was not until the case was tried that the Respondent, from the witness stand, enunciated its reliance upon the "maximum domestic price" theory, and such interpretation, or construction, was *not* in the form of an "order or regulation," but merely an *oral* interpretation by an official who was unauthorized to render such an opinion at the time the sales in this case were consummated by Petitioner. Such

oral opinion, rendered at the trial three years subsequent to the sale, should not be accorded a retroactive effect. This is recognized by the Ninth Circuit Court of Appeals itself in the case of *F. Uri & Company v. Bowles*, 152 F.(2d) 71 at 715, 718(3, 4)w, wherein it states:

> "Appellee calls to our attention the administrative construction and interpretation given the language of Amendment 12, with particular emphasis on the department interpretation of the language defining the status of a hotel supply house. He urges us to reject the interpretation advanced by appellants for the reason that we are legally bound by the administrative interpretation of this language under the doctrine of *Bowles v. Seminole Rock, etc. Co.*, 325 U.S. 410, 65 S. Ct. 1215, 1217.
>
> "But the problem here presented differs in a material aspect from the particular issue faced by the court in the *Seminole* case. A reading of that case indicates that there both the regulations and the 'administrative construction' thereof, were issued by the Administrator concurrently. This is not the situation confronting us in this case. At the time of the alleged violation of the regulations, August 3, 1943, the administrative constructions relied on and strongly emphasized by appellee had not yet been promulgated by the Administrator. Appellants confronted only the regulations and the Statement of Consideration in the issuance of Amendment 12 (hereafter referred to); not the regulations and these later administrative constructions. *They did not then have the subsequently issued administrative interpretations to guide them.* That chart was to come from the Administrator at a later time.

"When the case came to trial on August 25, 1944, these administrative 'interpretations' were then current, and available, as an aid to the court, although, as pointed out, they were, so far as the date of the offense was concerned, retrospective in character. *The later 'administrative constructions' of Amendment 12 available to the court at trial time, were not available to or binding upon appellants on August 3, 1943, since they did not then exist. Up to that time, the Administrator had not seen fit to promulgate an administrative interpretation (or interpretations) setting forth for the trade a definition of the term 'hotel supply house' which was clear and unequivocal and left no doubt as to how he intended to apply it in the enforcement of Amendment 12.*" (715) * * *

"The price Administrator is empowered to alter a status created by a prior regulation only by an order or another regulation (50 U.S.C.A., Appendix 902). Price Interpretation No. 29 of October 20, 1943, is neither. If the attempted interpretation of October 20 be regarded as a true interpretation of Amendment 12, it should have to relate back to May 26, 1943.

"The gross injustice of such a later contradictory interpretation to merchants relying upon the Price Administrator's interpretation of May 26, given at the time of the promulgation of Amendment 12, is equally obvious. It makes the Price Administrator say, in effect, that on May 25, these business concerns acquired a certain status by virtue of his interpretation, but on October 20, by a different interpretation they did not then acquire it. We cannot so construe the October 20 interpretation but regard it as an attempt to

change at that later date the established status of May 26, 1943. The Price Administrator's *attempt failed because he can make such a change only by order or regulation.*" (718, 719 (2,3))

F. Uri & Co. v. Bowles, 152 F.(2d) 713 at 715, 718, 719.

The Emergency Court has held:

"In the present case the complainants did not attempt to determine their maximum prices under Section 1499.3(c). Instead, they sold their whiskey at prices which the Price Administrator, in the treble-damages suit, contends were in excess of the maximum prices established by M.P.R. 193 for their most closely competitive sellers of the same class, if any, and in any event were higher than the level of maximum prices established by that regulation for their commodity. Having thus failed to take advantage of the procedure which was open to them for obtaining a prior precise determination of their maximum prices *they have left open in the enforcement suit in the district court the determination of their proper maximum prices under the regulation.*

"We thus come to the final question in the case. Is the determination of the complainant's in-line maximum prices for the sales which they made in January, 1943, and which are involved in the treble-damages suit in the United States District Court for the Western District of Kentucky to be made by that court in adjudicating that suit or is the determination of those prices which the Price Administrator has made by Order No. 45 valid and, therefore, binding on the district court under Section 204(d) of the Emergency Price Control Act? To put it another way, may the Price Administrator by an order directed solely to

that end determine the ceiling prices applicable to particular past sales which are the subject of an enforcement suit *brought by him in a district court where one of the issues before the court is the amount of the proper ceiling prices applicable to the sales?*

"(2) As we have seen, Order No. 45 *was directed solely to the past.* Its object was to determine exactly for the purpose of computing damages in the enforcement suit of the maximum prices for complainant's sales which Section 1499.3 of the GMBR (as incorporated by reference in Section 1420.13(c) of MPR 193) imposed upon them. * * * Here, however, the complainants did not request the Price Administrator to act *but left the question of their maximum prices wholly open for judicial determination. The sole purpose of the order, therefore, was to adjudicate a question which the Price Administrator by instituting the treble-damage suit, had himself previously committed to the district court. We think that the Price Administrator was without power to make a determination, through the medium of what purported to be a retroactive price order, of the question thus committed to the district court.*"

"The price regulations and orders authorized to be issued by the Price Administrator under Section 2 of the act, 50 U.S.C.A., Appendix 902, and which are incontestable in the district courts under Section 204(d) are limited to those which will effectuate the purposes of the act. Order No. 45 did not effectuate any one of those purposes, however."

"Since its only object was to liquidate the damages in a pending suit between the Price

Administrator and a group of alleged over-ceiling sellers it could only derive its authority from the act if one of the purposes of the act was to authorize the Price Administrator *to decide issues of fact with respect to past transactions which he himself has already committed to a court of adjudication.* We are satisfied that Congress had no such purpose in mind in passing the act and it is most doubtful whether Congress could have so provided if it had desired to do so. For, as we recently had occasion to say in *Lee v. Fleming* (Em. App. 1946) 158 F.(2d) 984, 'such action would not only appear to involve the usurpation of judicial power which is vested in the courts alone, but would also *clearly be at war with the fundamental concept of due process of law that parties to controversies are entitled to have them determined by an impartial tribunal.*"

"The question to which Order No. 45 is directed, the level of maximum prices established by MPR 193 for the bulk whiskey, is a factual one with which the district court is quite as competent to deal as is the Price Administrator. Indeed, it is just the sort of problem with which courts are called upon to deal every day and for the solution of which the judicial process is designed. The question is not a legislative one nor has Congress committed it to the exclusive determination of the Price Administrator. *On the contrary the Price Administrator himself has committed it to the district court by instituting the treble-damages suit in which it is a major issue.*

"For the reasons stated we conclude that Order No. 45 is not in accordance with law and is, therefore, invalid. It accordingly becomes unnecessary for us to discuss the other questions raised by the

complainants. * * * A judgment will be entered declaring that Order No. 45 issued on June 13, 1945, under Section 1499.3(c) of the General Maximum Price Regulation was invalid from the date of its issuance." * * *

(On Rehearing):

"We held that Order No. 45 was neither authorized by Section 1499.3(c) of the General Maximum Price Regulation, under which it purported to be issued, nor by Section 2 of the Emergency Price Control Act, 50 U.S.C.A., Appendix 902, which gives general authority to the Price Administrator to issue price orders, and that Order No. 45, was therefore invalid. We do not regard Section 1499.3(c) of the GMPR *as authorizing or contemplating a retroactive price order of the character of Order No. 45 to be made by the Price Administrator in the absence of* an application by a seller. Whether the regulation authorizes such an order to be made upon application of the seller is a question not before us. * * * It was, as we have just stated, that the order was invalid because it was not authorized by the regulation or the act. Objections upon this ground were clearly stated in each of the protests. It is true that we suggested that if the act had authorized such an order as Order No. 45 it might *well have been unconstitutional as involving unsurpation of judicial power but our conclusion was that Congress had no such purpose in mind in passing the act.*"

Collins v Fleming, 159 F(2d) 431 at 437, 438, 439

The foregoing decision is important in two respects: (1) It establishes that it was the Administrator's own

opinion that an order establishing dollars and cents prices at the place of sale was a necessity — which is Petitioner's contention herein. (2) It seems to be at variance with the conrt's decision wherein an ex post facto order establishing prices was upheld.

Martini v. Porter, 157 F.(2d) 35, 40 (9th C.C.A. quoted *supra*).

In a case where the facts are somewhat similar the court has held:

"*Since the Act and the regulation do not establish any specific ceiling price for the commodity sub judice, defendants are entitled to know not only what the government claims the ceiling price to be, but also the manner in which it arrived at this conclusion.* It may be that the government's method of calculation is erroneous. If so, defendants should have the opportunity to challenge this defect if, in fact, it exists. * * *

"*If the government erroneously computed the ceiling price, defendants should have the opportunity to object to such error without the necessity of standing trial.* * * *

"*We do not know how the ceiling price was computed by the draftsmen of the indictments.* Defendants, therefore, have no means of testing the accuracy of the pleaded conclusion that the ceiling price, for the transactions occurring subsequent to April 22, 1943, was any particular figure. * * *

"* * * Since no ceiling price is fixed in Regulation 269, the indictment must show how the grand jury arrived at the ceiling price for the particular defendant for, as I said before, a defendant should be permitted to take advantage of a faulty

calculation before trial and consequently he should be informed of all material elements that go to make up the crime. I accordingly refuse to alter the result of my original opinion."

United States v. Johnson, 53 F. Supp., pp. 170, 171, 172, 173.

"There are two roads pointed in this statute. One is for the citizen in his protest, and his remedy. That road leads to the Emergency Court at Washington, and to the Supreme Court. *The other road is for the use of the Administrator. He enters court against the citizen. That court is neither the Emergency Court nor the Supreme Court. It is any state or national court which has jurisdiction of the controversy. It is the local court. That is the road upon which the parties arrive here.* * * *

"The general authority given to the Administrator to make regulations is that they shall be 'Generally fair and equitable.' * * *

"The defendant in accepting battle where it was begun by the complainant, does so by stating that the Administrator is seeking to enforce regulations that are not 'generally fair and equitable.' That there is another provision of the Act which vests 'exclusive jurisdiction' in the Emergency and Supreme Court to pass upon the 'validity' of regulations, and to stay orders made by the Administrator, is not a sufficient answer nor a sufficient program as to what shall take place in and upon this voyage. * * *

"Whether the defendant shall get anywhere in its attack upon regulations made by the Administrator for the defendant's business, is beside the question. We do not need to argue that one may

not enter court until he has exhausted his administrative remedy. *We all know that.* The requirement for such entry is no novelty. * * *

"We must bear in mind that the litigation as to jurisdiction of other courts to do what the Emergency Court and the Supreme Court is given the power to do, does not limit the trial court upon the second road, to *require the Administrator to make out his case before he shall be entitled to restrain the citizen. In the making of that case, the citizen has his rights. He is called into court.*
* * * * * * * * * *

"The only way to give the citizen such right is to preserve his right to plead and to present his testimony and then to determine whether he is correct, or, whether the plaintiff is correct.
* * * * * * * * * * *

"One may conceive of such a lack of 'equity' as to deny the complainant the restraint he prays, and yet in no way interfere with the 'validity' of a regulation. * * *

"Upon argument in open court, it was contended that certain errors had been made by the Administrator as to bacon, which he later corrected. That certain errors had been made with reference to tea by itself, and tea with a glass, and that certain mistakes had been made concerning the sales of bread. * * *

"That is the sort of inquiry that the court permits under the general idea and the prominent requisite that a regulation must be 'fair and equitable.' Equity being the overhead dominant as to both the plaintiff and the defendant in this suit." * * *

Brown v. Wyatt Food Stores, 49 F. Supp. 538.

"We think counsel's zeal and enthusiasm for the sanctity of such interpretations are hardly warranted. This doctrine would relegate the statutes of Congress to an inferior position unjustified even in these times when the compulsion of an emergency compels us to clothe administrative agencies with extraordinary powers. * * *

"(1) We do not accept the Administrator's view that he may promulgate a regulation and *then place on it an interpretation which becomes controlling on the courts.* The Administrator has not grown to any such stature. *The courts may consider his interpretations and follow them, if correct, but the court is not bound to follow United States,* 288 U.S. 294, 325, 53 S. Ct. 350, 77 L. ed. 796; *Bowles v. Nu Way Laundry Company,* 10 Cir., 144 F.(2d) 741. * * *

"(2-4) We think the District Court had a right to determine the meaning of these regulations for itself, although it could not, and did not, undertake to pass upon their validity, since that authority resides in the Emergency Court of Appeals and in the Supreme Court. Section 204, Emergency Price Control Act 1942, 50 U.S.C.A., Appendix §924. Having made its own interpretation, the District Court was justified in rejecting the Administrator's interpretation of these regulations."

Bowles v. Simon, 145 F.(2d) 334 at 336-337 (C.C.A. 7).

"Misinterpretation of regulations by the Administrator need not be followed by the courts, particularly if they are merely arbitrary edicts of the Department."

Norwegian Nitrogen Prod. Co. v. U.S., 288 U.S. 294 at 318, 77 L. ed. 796 at 809.

It should be noted that our actions in requesting information followed the procedure directed by the Administrator himself.

> "Where the Administrator had issued an order under M.P.R. No. 188 instead of under General M.P.R. *'it is still open to the Protestant to challenge in the pending enforcement action, the Administrator's interpretation.*"
>
> Opinion of Chester Bowles, Adm., P. & F. O. P. A., Opinions and Decisions, Vol. 3, p. 303 at 304.

The Emergency Court of Appeals holds:

> "We have decided that where a District Court in an enforcement proceeding has interpreted a regulation as being applicable * * * we must *accept the District Court's interpretation.*"
>
> *Van Der Loo v. Porter*, 160 F.(2d) 110, at 112 (1). (Emergency Court of Appeals, September 5, 1946).
>
> *Conklin Pen Company v. Bowles*, 152 F.(2d) 764 at 766(4, 5).
>
> "The propriety of the classification as a matter of fact and the interpretation of the regulations are questions for the enforcement court; as to them we refrain from gratuitous expression of opinion."
>
> *Gordon v. Bowles*, 153 F.(2d) 614, at 615 (1-3) 616.

With respect to the doctrine that "Congress was satisfied that ample safeguards against arbitrary exercise of the allocation powers would be afforded by procedures within the administrative agencies them-

selves (264) the coordinate District of Columbia Court of Appeals has stated:

> "If applied to a specific Congressional prohibition, that doctrine would spell executive absolutism, a concept unknown to our law * * * if the judiciary has no power in such matter, the only practical restraint would be the self restraint of the executive branch. Such a result is foreign to our concept of the division of power of the government."
>
> *Fleming v. Moberly Milk Products Company*, 160 F.(2d) 259 at 264, 265, 266. Petition for Certiorari dismissed at the request of Petitioner, 91 L. ed. 1077, May 5, 1947.

In the footnote (13) of the foregoing case, an extended quotation of legal authorities, upholds the legal doctrine "whether the agency acts within the authority conferred or goes beyond it, whether there is compliance with the legal requirements which fix the province of the agency, are appropriate questions for legal decision."

> *Fleming v. Moberly Milk Products Co.*, 160 F.(2d) 259 at 265. (Footnote 13).
>
> "What, then in light of the evidence, is the weight to be attributed to the Administrator's *interpretation given some eight months after this suit was commenced?* In *Bowles c. Seminole Rock & Sand Company*, 325 U.S. 410, 414, 65 S. Ct. 1214, 1217, 89 L. ed. 1700, the Supreme Court laid down the broad rule that courts must look to the administrative construction if the meaning of the words used in the regulation is in doubt, and that the Administrator's interpretation 'becomes of controlling weight unless it is plainly

erroneous or inconsistent with the regulation.' But in this case the Supreme Court was considering an administrative *interpretation issued concurrently with the regulation, not an interpretation which was issued after the alleged violation took place and after the litigation was commenced by the Administrator seeking to enforce the particular regulation.* Neither the trade in general nor this defendant had the benefit of the administrative interpretation during the period of the alleged violations. It is not made to appear that the trade, in light of its experience in dealing with petroleum products, has ever considered that stove and light naphtha was a distillate fuel oil, as that term is commonly used and understood. That confusion has existed in the Office of the Price Administration as to which category of the regulation embraced stove and light naphtha is evident from the shifting position of those who instituted and carried on this lawsuit and the companion proceeding in behalf of the Administrator. *If experienced counsel acting in his behalf flounder in their attempt to classify properly* stove and light naphtha *under the regulation, it would seem to be a gross injustice to bind the defendant herein to the bald assertion of the Administrator as to what his predecessors meant when the regulation was promulgated by them.* If the Court is bereft of all authority to determine the correct interpretation of a regulation, in light of the evidence before him, then the Administrator in any pending lawsuit involving the interpretation of a regulation may, by belated edict, control its outcome. Surely, such an absurdity was never intended. * * *

"Paraphrasing the language of the court in the case of *Uri & Co. v. Bowles*, 152 F.(2d) 713, 715,

it may be stated that the defendant in this case had no chart to guide it during the entire period of the alleged violations with reference to the interpretation which the Administrator now seeks to impose. After this suit was commenced, it was informed that stove and light naphtha was in fact a gasoline and should be governed by the regulations covering gasoline. Later, it was intimated that, if the product was not covered by the gasoline regulations, it came within the preview of industrial naphtha or solvents derived from petroleum. Even as late as Dec. 5, 1945, in Amendment 25, the Administrator advanced the contention that stove and light naphtha could be classified as a gasoline. But it is not made to appear why the Administrator abandoned his claim that the naphtha product sold was in fact a gasoline under the regulations. * * *

"Certainly as stated in *Estate of Sanford v. Commissioner*, 308 U.S. 39, 60, S. Ct. 51, 60, 84 L. ed. 20, '* * * courts are not bound to accept the administrative construction of a statute regardless of consequences, even when disclosed in the form of rulings. * * *' It follows without more that plaintiff having failed to sustain the burden of proof which devolves upon him in this regard, judgment must be entered for the defendant."

Porter v. Tankar Gas, 68 F. Supp. 103 at 108, 109-11.

In answer to the lower court's statement that Petitioner could have asked "for an authoritative written interpretation" (R. 834), as hereinafter set forth, may we call to this Court's attention that it was months after the sales were first made, that the "price

at which acquired" theory was being questioned. The following decision is most enlightening:

"The defendant has already sold the goods in violation of the regulations and is not now selling or contemplating selling in an illegal manner. A present application by the defendant for the establishment of a price for the sale of goods already made will not be a compliance with the regulation which requires an application to be made *before the sales take place;* and the nature of the transaction will not be changed by an order of court. *In short, it is not now possible for the defendant to comply with the regulation of the Administrator.*" (269(3) * * *

"At any rate, although he was fully clothed with power to do so, he did not prescribe the maximum prices of goods sold by one like the defendant who was in duty bound to make application for maximum prices but failed to do so; and hence such a person in 1943 did not violate a regulation or order prescribing a maximum price and was not subject to the penalty of treble damages imposed upon one who charges more for his commodities than the established price." (269(4) * * *

"The question is not free from difficulty and it is well that the Administrator propounds it for decision; but we are of the opinion that the court is without power to amend the statute *or to change the regulation so as to require the defendant to do after its sales that which it should have done before.* In support of this conclusion it should be noted that the ultimate aim of the present suit is the imposition of the triple penalty prescribed by 205(e) of the Act; and that the court should not read into such statutes, even

when they are enacted for the public good, provisions not inserted by legislative authority. This rule has been specifically applied by the Supreme Court to the criminal sanctions of the Emergency Price Control Act in *M. Kraus & Bros. v. United States*, decided March 25, 1946, 66 S. Ct. 705; and the language there used is not without pertinence to the penal provisions now under consideration." (269(5) * * *

"The Administrator did make provision for a case of the kind now before the court on December 27, 1943, when he promulgated Amendment 9 to Maximum Price Regulation 445, effective January 6, 1944, whereby he fixed specific maximum prices for the sale of distilled spirits not sold or offered for sale by a processor during March, 1942. *This action, however, was taken after the defendant violations had occurred.*" (270(5) * * *

Porter v. Block (C.C.A. 4) 156 F.(2d) 264 at 269, 270.

"The very structure of our institutions, the very sources from which they derive the judicial section of the Constitution itself all concur to make it crystal clear why Congress has never given, why it could not constitutionally give to the construction of a Statute by the General Counsel of an administrative body or by the body itself controlling weight and that the 'appropriate weight' which the courts give to such construction is that which is not inconsistent with settled Constitutional doctrine. The hearsay eagerly advanced by some devotees of the administrative power * * * sometimes toyed with judicially, that giving 'due weight' means the surrender of the judicial office of interpreter of statutes, has never had of-

ficial sanction. Perhaps it has never been better negated, the true rule better stated, then by this court. * * *. And this is bound to be so for the very foundation stone of our liberties is the fact that judges without interest in the result are to determine and apply the law as old Hooker put it, 'with all indifferency.' When we turn from the statute to the courts, we find no case which at all supports the claim made here that where a statute has defined a term, courts must, though they do not agree with it, follow the administrator's opinion as to its meaning."

Duquesne Warehouse Company v. Railroad Retirement Board, 148 F.(2d) 473 at 478, 479 (C.C.A. 2).

"Where an ordinary layman has acted on the advice of the attorney for Plaintiff (District Price Attorney) the court should be liberal in construing the regulation in the defendant's behalf, particularly so if there is any ambiguity or difficulty in understanding or complying with them."

Porter v. Nelson-Picks Creamery Company, 69 F. Supp. 225 at 227.

"The burden of proof is upon the Administrator of the O.P.A. in challenging a sale as being above the seller's ceiling, *to prove what the ceiling is*, and where, as here, this was not done, there is no basis for a finding that the seller has violated the General Maximum Price Regulation * * *."

Bowles v. Gulf Refining Co., 3 O.P.A. Decisions 2247 at 2249.

The present decision states (R. 834) that "It is claimed, also that the formula prescribed was so vague and complex that appellant was unable to ascertain the

applicable ceiling prices for his product." Not only was the Minnesota formula (Order No. 3) under M.P. R. 193 "vague and complex" to Petitioner but the formula could not be worked out intelligently by *any* O.P. A. official who tried to do so. The oral interpretations of different O.P.A. officials made a variance as to the alleged ceiling price at Seattle, ranging from an overcharge of $53708.48 down to $21809.89, according to the testimony. Even the enforcement attorney who commenced the action was $10000 over the alleged ceiling price, and the testimony of the O.P.A. official upon the witness stand showed that he was in error by $2,-266.77, if another factor in the formula was interpreted differently (R. 772, 803). Petitioner's testimony showed that, rightly interpreted, there was an under charge of $20745.38 under the alleged ceiling price (R. 793, 798). Also, the item of "freight from the rectifying plant to wholesaler" was omitted entirely in the interpretation of Respondent's "expert" witness on the stand (R. 722-723). The District Court, also, was most confused (R. 751, 782-783). Admittedly, then, such "vague and complex" formula should have been interpreted by some authorized official of the O.P.A. by some form of written order.

But, said the lower court, "there were adequate avenues of relief open to him by application to the Administrator for an authoritative written interpretation, or for an adjustment. Appellant resorted to none of the available methods of dispelling his uncertainties" (R. 834).

May we again call this Court's attention to the following facts. As to an "authoritative written inter-

pretation," Petitioner did everything possible to obtain such an interpretation. On October 7, 1943, a letter was written to the Beverage Division in Washington, D. C., wherein Petitioner requested an opinion about the "pricing of Tom Burns Whiskey for shipment to Alaska." To this an answer was received "Prices covering such shipments were established *under an interpretation issued by the Seattle office*" (Shyman's Exhibit S.16). This letter was signed by E. G. Even, head, Beverages and Imported Foods Section, Food Price Division.

Inquiry to the local enforcement officer of the O.P.A. concerning such interpretation caused Petitioner's counsel to write again to the Beverage Division at Washington, D. C., to "furnish the information desired by me, as to the items making up the ceiling prices for Tom Burns Whiskey in Alaska, * * * kindly give me the formula followed by your office, * * * will you kindly inform me when such ceiling prices were established * * * (Shyman's Ex. S.17). An answer from the same E. G. Even stating that such information "could best be secured from our O.P.A. office in Seattle. * * * We feel, therefore, that any information relative to that interpretation should be issued by the *originating office*" (Shyman's Ex. S.18).

Consequently, on October 18, 1943, a letter was sent by Petitioner's attorney to the local enforcement attorney in which it was stated "Inquiry of Hon. J. B. Sholley, Price attorney in Seattle of the O.P.A., revealed that, so far as he knew, the Seattle office had no written regulation or order on file establishing such prices. * * * Inquiry of Hon. F. R. Burrus, en-

forcement officer of the O.P.A., reveals that there is no written ruling or regulation in the Seattle office establishing such prices * * * That the items of the formula by which said ultimate ceiling prices were worked out were unknown to the Seattle officials of O.P.A. * * * There may be an error in such prices, but such error cannot be ascertained until the items used by your Department in following the formula set up in the O.P.A. Regulations are made known to us. Consequently, may we respectfully request such items. * * * Or, if you cannot give us such items, will you kindly give us the information as to what officials in Washington, D. C., to whom we should write in order to obtain the costs going into such designated prices" (Shyman's Ex. S.19).

No answer having been vouchsafed to such request, a letter was written to Hon. Arthur J. Kraus, Director of the Seattle Office of the O.P.A., on November 26, 1943 (Shyman's Ex. S.20) in which the request for items of the formula recited:

> "Since officials at Washington, D. C., state that the Alaska prices on Tom Burns whiskey 'were established under an interpretation issued by the Seattle office' may I, again, respectfully request from your office the date when such interpretation was made, by whom and where it was made, the figures constituting the formula whereby such ceiling prices were arrived at, and where and when in your office an interested party could have ascertained that such ceiling prices were established and the written memoranda covering such essential information."

No answer to such inquiry was ever received. In

this connection it should be noted that there are no forms wherewith an "authoritative written interpretation" may be obtained. As to an "adjustment," an eight-page letter offering $30233.45 as an "adjustment" for an alleged overcharge was merely answered by a return of the check; no information as to the detailed ceiling prices on *any* alleged overcharge was ever received from any O.P.A. official in writing (Shyman's Ex. 512; R. 46, 608). What more can this court suggest should have been done by Petitioner?

This court should also note, factually, that the conditions in the greater part of Alaska are such that for only a few short months can commodities be shipped to Alaska. Thus, Alaska distributors and buyers must accomplish in a short season what can be done throughout the year in the continental United States. On account of such conditions, the price situation had to be handled differently as shown by the decisions of the Administrator in the *Anchorage Grocery Co.* and *Otto Kraft & Sons* cases (Quoted *supra*).

The lower court states that "written interpretations" must be obtained. Such interpretations as to "acquisition cost" were obtained (Shyman's Exs. S.7, 8, 9), and were being acted upon, such interpretations being in line with the trade practices established since 1934. Nothing more could have been done, than was done by Petitioner in this case, to comply with the intricacies and complexities of the O.P.A. Regulations. So much for the facts.

As to the law, the Supreme Court has ruled that even if a challenged regulation has been rightfully appealed to the Emergency Court of Appeals, that

court should "refuse to pass on the applicability of the regulation to the petitioners." It left "that question to the District Court before which the treble damage suit is pending" (48, (1, 2). * * *.

> "The two modes of securing a hearing on the validity and applicability of the price regulation are cumulative and not alternative." (49(3, 4)))
>
> *Collins v. Porter*, 328 U.S. 46 at 48 (1, 2).

This court can pass on the validity of the act of Congress which made the Regulations effective retroactively.

> *Case v. Bowles*, 327 U.S. 92 at 98, 66 S. Ct. 438;
>
> *Yakus v. U. S.*, 321 U.S. 414, 431, 64 S. Ct. 660.

> "Any ruling at the trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure would be reviewable by appeal on constitutional grounds."
>
> *Yakus v. U. S.*, 321 U.S. 412 at 434-436.

The only way for Petitioner to enter a protest under the provisions of 203(a) of the Act of 1942, was to get a *price schedule in writing*, from some authorized official. Petitioner wrote to the Regional Administrator in San Francisco, offering a compromise settlement in the hopes of getting a written ruling (Shyman's Ex. S.12, R. 46, R. 608). No answer was returned to Petitioner. Consequently Petitioner was deprived not only of his right of Protest, but also of his

right of appeal to the Emergency Court of Appeals, under Section 204 of the Act.

Such "Price Schedules" are not effective or legally enforceable in Court until published in the Federal Register (Sec. 206, Act of 1942). Thus, no oral interpretations are enforceable.

Congress in 1935 provided by statute (C. 417, 49 Stat. 500) for the establishment of the Federal Register. The statute requires the filing with a division of the National Archives Establishment of official documents, which are defined to mean "any Presidential proclamation or Executive order and any order regulation, rule, certificate, code of fair competition, license, notice, or any similar instrument issued, prescribed, or promulgated by a Federal agency" other than the legislative or judicial branches. The Federal Register is published daily and contains documents of general applicability, including every document or order which prescribes a penalty. Documents required to be published are not valid until filed with the division of the National Archives Establishment and by it made available for the public inspection.

Gellhorn, Administrative Law, p. 262.

None of the interpretations by Seattle O.P.A. officials were ever printed in the Federal Register (R. 553, 554, 556).

> "The protest proceeding to the Emergency Court of Appeals is merely a cumulative remedy and not an alternative remedy and the question of the validity of the interpretation is rightly before this Court in this enforcement proceeding."
>
> *Collins v. Porter*, 328 U.S. 46 at 49 (3, 4).

4. THE DECISION IN THIS CASE HAS DECIDED FEDERAL QUESTIONS IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Ninth Circuit Court of Appeals in this case gave no consideration in this case to Petitioner's argument that the Due Process, Commerce, Liquor Repeal clauses of the United States Constitution were applicable to certain phases of this litigation. Hereinbefore we have presented the contention that under the Liquor laws of the State of Washington there can be no "domestic" sale of liquor in the State and that the oral decision of the Administrator's assistant could not constitutionally declare sales of liquor from K & L Distributors to Petitioner could be held valid.

May we accentuate again our previous argument that we not only requested from the authorized officials of the O.P.A. a written statement of the price structure applicable to Petitioner's sales and we have urged that "the failure of any written interpretation has deprived Petitioner of a valuable constitutional right of attacking the validity of the actions of the O.P.A. officials in this case." Manifestly, it is impossible to file a protest and appeal therefrom to the U. S. Emergency Court of Appeals, on a mere *oral* interpretation. Such protest procedure is based upon some regulation or order of an authorized official. If all such authorized officials refuse to answer requests for interpretations—as did the official in this case, as hereinbefore demonstrated—then Petitioner is precluded from obtaining relief from the Emergency Court of Appeals. Being so precluded, Peti-

tioner's *only* redress is in this court under the due process clause.

5. THIS CASE SHOULD BE DISMISSED BECAUSE ERRONEOUSLY BASED UPON NON-APPLICABLE ORDER NO. 3 UNDER M.P.R. NO. 193 AND 2ND REVISED MAXIMUM EXPORT PRICE REGULATION, INSTEAD OF BEING BASED UPON APPLICABLE M.P.R. NO. 194.

Petitioner's market for his Tom Burns Whiskey being in Alaska, it is Petitioner's contention that O.P.A. Regulation No. 194 is the Regulation applicable to all sales made by Petitioner as a wholesaler to his Alaska dealers.

The lower court states that this Regulation, M.P.R. 194, is inapplicable, quoting in its footnote (R. 833) a provision contained in M.P.R. 194 (R.833).

But such quoted provision refers to the Revised Maximum Export Price Regulation, which was superceded by the 2nd Revised Maximum Export Regulation. But such 2nd Revised Maximum Export Regulation did not have the saving clause that it applied to Alaska, as required by Amendment No. 10 hereinafter quoted.

The dollars and cents values of Tom Burns Whiskey was not adopted for Alaska until May 23, 1944 (9 Fed. Register 5487), approximately a year after the sales and delivery of Tom Burns Whiskey by Petitioner to his Alaska customers.

The foregoing Regulation is designated by the Administrator "Part 1418—Territories and Possessions (Maximum Price Regulation No. 194) Alaska (S. Ex.

1, R. 44). Under the heading Sec. 1418.52, the Regulation reads "Maximum prices for commodities not actually produced or manufactured in the Territory of Alaska, (a) * * * with respect to any commodity for which a maximum price has been established in the Continental United States and which is not actually manufactured or produced in the Territory of Alaska, the *maximum price to a buyer in the Territory of Alaska shall be:* (1) *The direct cost to the seller of the commodity sold.* (2) Plus the amount of mark-up over the direct cost to the seller of the commodity sold during the period from Nov. 7, 1941, to Dec. 6, 1941 * * *" (of a like commodity, if the particular brand was not sold during that period). Such "cost to the seller" and the customary 20% "mark-up" was testified to by Petitioner in detail (R. 617, 647-648).

By Amendment No. 10 of M.P.R. 194, it is provided "The provisions of this Maximum Price Regulation No. 194 *supersede the provisions of all other maximum price regulations*, except where other maximum price regulations provide that notwithstanding Maximum Price Regulation No. 194 such other regulations shall be applicable in the Territory of Alaska." This Amendment was filed with the Federal Register (F.R. Doc. 34-780) and was in force during the whole of the period (April, 1943—September, 1943) in which the sales were effectuated by Petitioner to his Alaskan buyers.

In this connection it should be noted that neither Order No. 3 under M.P.R. No. 193, nor the 2nd Rev. Max. Exp. Price Reg. which Respondent contends is the Order and Regulation—when properly interpret-

ed establishing that Petitioner made a $21,809.89 overcharge to his Alaska customers—*contain any statement therein that "such other regulation shall be applicable in the Territory of Alaska."* Certainly no language can be clearer than the provision in M.P.R. No. 194 that "the maximum price *to a buyer* in the Teritory of Alaska shall be,"

May we again emphasize the fact, however, as recited hereinbefore, it is not the place of business of the merchant seller, but the "market" of the commodity" that is the factor which should control the Administrator in all actions brought by such Administrator. As illustrative of such fact are analogous tax cases decided by the United States Supreme Court, and other courts, where the office for the transaction of business is not the essential element, but the "market" of the "commodity" is the sole and necessary factor.

The United States Supreme Court and the Supreme Court of the State of Washington, for instance, have decided that where a selling merchant does business exclusively in a State by salesmen and sales methods similar to those set forth in the Agreed Facts in this case, "traditional notions of fair play and substantial justice" require that such state being the "market" for the "commodity" shall have the right to impose a tax for the sales of such commodity.

International Shoe Co. v. State of Washington, 66 Sup. Ct. 154 at 159-161;

International Shoe Co. v. State of Washington, 22 Wn.(2d) 146.

This Petitioner, as Amicus Curiae, was a major

factor in having the courts of the State of Washington decide that his business being wholly and exclusively the sale of liquor products in Alaska, no tax could be imposed upon him in the State of Washington. Counsel for Respondent concedes that to be the law (R. 725-726), in that the "market" for the "commodity" having its situs in Alaska, such liquor products are in interstate commerce from the time they are first shipped by the original seller until they reach their ultimate Alaskan purchaser. No act of any intermediate authority, be it a State or an O.P.A. administrative official in the United States can be allowed to interrupt the flow of that commodity to its destination in Alaska.

> *W. J. Lake & Co. v. King County*, 3 Wn. (2d) 500; rehearing 4 Wn.(2d) 651, Certiorari denied 311 U.S. 715 (Quoted hereinbefore).

The reasoning of the courts is set forth in the cases exhaustively quoted in the *Lake* case, some of which are hereby cited, supplemented by later decisions of like tenor.

> *General Trading Co. v. State Tax Commission*, 322 U.S. 335, at 337-338, 88 L. ed. 1309, 1311-1312;
>
> *International Harvester Co. v. Indiana*, 322 U.S. 340 at 354-355, 88 L. ed. 1313 at 1321-1322;
>
> *Frane v. Louisville Cement Co.*, 134 F.(2d) 511 at 516, 146 A.L.R. 926;
>
> *Felt Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 at 64-66, 83 L. ed. 488 at 490-491;

Spalding & Bros. v. Edwards, 262 U.S. 66, 67 L. ed. 866;

United States v. Gosho Co., Inc. (C.C.A. 5) 23 F.(2d) 675;

Texas & New Orleans R.R. Co. v. Sabine Tram Co., 227 U.S. 111, 57 L. ed. 442;

Railroad Com. of La. v. Texas & Pac. Ry. Co., 229 U.S. 336, 57 L. ed. 1215;

Carson Petroleum Co. v. Vial, 279 U.S. 95, 73 L. ed. 626;

Hoover & Allison Co. v. Evatt, 324 U.S. 652, 89 L. ed. 1252;

Richfield Oil Corp. v. State Board of Equalization (Nov. 25, 1946) 91 L. ed. Adv. 123.

Thus, it has been decided by an overwhelming line of decisions that the particular liquor commodity owned by this Petitioner, cannot be other than a commodity that *must* be sold in Alaska. Consequently, the State of Washington by no form of legerdemain can levy a tax which will interrupt the commerce flow of that commodity. In an analagous way, the Administrator should not be permitted by this court to assert in this action that Petitioner's commodity sold and delivered to its Alaska dealers becomes a domestic sale in the City of Seattle by an unwritten interpretation of Seattle O.P.A. officials. At Seattle the commodity is still in transit and its commerce flow cannot be changed by any argument that because the Petitioner has a forwarding office in Seattle the commodity thus comes to rest in Seattle breaking the commerce flow, constituting thereby a domestic sale, making the Peti-

tioner assume a new characterization designated by local O.P.A. unwritten interpretation "an exporter," and by an "export regulation" determining that Petitioner has over-charged his Alaska customers by many thousands of dollars on the sales and delivery in Alaska of the commodity handled by him. Parenthetically, again may it be emphasized that *at the times of these sales and delivery* in *Alaska there was no maximum prices for the sales of Tom Burns Whiskey in the Territory of Alaska* (Agreed Facts, para. H, R. 43, R. 794).

Be it remembered, again, that the Maximum Price Control Act of 1942, says nothing about "an office for the transaction of business," as governing prices. As the courts have said "the competition is a competition between products" and the competition for the sales of Tom Burns Whiskey, as to this Petitioner, was the "market" in Alaska.

> *Bowles v. Wilson & Co.*, 83 F. Supp. 687 at 689.

Consequently, it is Petitioner's contention that this case should be dismissed because Respondent has proceeded upon an entirely erroneous theory based upon a non-applicable Regulation (Order No. 3, M.P.R. No. 193 and 2nd Rev. Max. Exp. Pr. Reg.) instead of being based upon the applicable M.P.R. No. 194.

6. "GOOD FAITH" OF PETITIONER JUSTIFIES A DISMISSAL IN THIS CASE.

In its decision the District Court dwelt at length on the good faith exemplified by Petitioner in this case. As the Court says (R. 819-820):

> "I have never seen proof in any case of more good faith on the part of citizens to try to comply with the O.P.A. statute and regulations than that of Defendants made manifest to the Court in this case. While good efforts to abide by a rule of law like this may not excuse unintentional failure to comply with it, yet I emphasize that these defendants in this case, according to the evidence, have followed a course of praiseworthy conduct in their oral efforts to keep themselves constantly advised of the O.P.A. regulations and changing conditions thereof and the maximum prices thereunder.
>
> "The defense of estoppel, I believe, cannot be sustained, although these Petitioners under the circumstances of this case may have reason to feel disappointed that the law did not do what a reasonable man in an individual case might do and give effect to the letters written by local price office representatives in general terms approving of Defendant's practices."

Under such circumstances, the following language of the Emergency Court of Appeals would seem to be worthy of consideration by this Court:

> "Two succeeding paragraphs of the same section of the statute are pertinent. (9) Paragraph (d) (Sec. 205, Act of 1942) says that no person shall be liable for damages for anything done "in good faith pursuant to * * * any regulation, * * * notwithstanding that subsequently such * * *

regulation * * * may be modified, rescinded, or determined to be invalid. Paragraph (e) of the same section provides that if a person 'violates' a regulation he shall be liable for damages not less 'than the amount of the overcharge, even if the violation was neither willful nor the result of a failure to take practicable precautions against the occurrence of the violation."

"(5, 6) The provision in paragraph (d) that damages shall not lie for an act done *in good faith pursuant to a regulation even* if that regulation be subsequently modified, is striking. One would assume that damages would not lie under those circumstances without any such statutory prohibition. The insertion of the novel precaution serves to emphasize that a modification of a regulation does not carry *retroactively* a liability for damages. That provision makes necessary a sharp distinction between a mere interpretation by the Administrator and a modification by him of a regulation. *Moreover, when the statute refers to an act in good faith pursuant to a regulation, it seems to contemplate the contingency of a doubt as to the meaning of the regulation.* If the meaning be certain, and an act be pursuant to it, no requirement of good faith would seem to be requisite to non-liability. The requirement that an act 'pursuant to' a regulation be in good faith has significance only if the meaning of the regulation be uncertain. Thus it appears that if one acted according to what was in all good faith the apparent meaning of the regulation, damages will not lie. *The emphasis here must be on the good faith.* The statute does not permit the conjuring up of a possible meaning as a protection. Full effect must be given the stringent requirements of paragraph (e) relating to violations,

but equally full effect must be given to paragraph (d)."

"*The District Court found as a fact that Mrs. Van Der Loo acted in good faith. No dispute is offered to that finding.* The Administrator says that his ruling of April 25, 1945, was an interpretation of the regulation; that it was a proper interpretation, and that, therefore, any deviation from it was, from the beginning, a violation."

"Furthermore, the Administrator himself later amended the regulation to cure this conceded anomaly. And when he did so, he announced that a nationwide survey showed that the number of these abnormally low markup relationships was sufficiently small to preclude any possibility of a general price rise resulting from the action taken in the amendment. He pointed out that these retailers had been unable to purchase merchandise because of the clearance sale retail price they would have to use. In the amendment he promulgated a rule not only for the relief from base-period sales below cost but for all base-period markups more than 20 percentage points below the average for the category. This was his view of what had to be done, and what was reasonable to do, as he looked at the results of his interpretation of the revised regulation."

"The Administrator's position in the case at bar is the barest technicality."

"(8) The Administrator's ruling here involved was in the form of a letter written in this particular case by a local enforcement officer. Technically it automatically became an official act of the Administrator by operation of a general procedural rule of his office. But it was not a

published ruling, nor, so far as the record shows, was it public. It was not an administrative interpretation of long standing *but was made after this controversy had arisen;* was written two years after MPR 330 was issued, and was thereafter nullified by Amendment No. 5. Thus, it does not carry the great weight of presumptive validity which *attaches to long-continued, consistent, published administrative rulings.*"

"The Administrator says that his letter to Mrs. Van Der Loo was an interpretation. But if, in fact, it was a change in meaning, it was modification. He had power either to interpret or to amend. But if the Administrator really changed the meaning of the regulation, he could not thereby render liable to damages a retailer who in good faith had theretofore pursued the original regulation."

"(9, 10) *The District Court gave appellee the benefit of her clear good faith* and so, in effect, held that she was not 'violating' the regulation; and that in following what was both its letter and its sense, she was acting pursuant to it within the meaning of the two pertinent paragraphs of the statute. We agree with that view. The ordinary meaning of 'markup' does not include a sale below cost, and that ordinary meaning is consistent with the purpose of the Act and with the later thought of the Administrator. We think it was the meaning of the regulation and that the 'interpretation' was really a change in meaning."

"The question is not whether the ruling of the Administrator was valid prospectively as an administrative regulation. The question is whether it was so clear a translation of the terms of the

original regulation as to render retoractively the original of this retailer a violation of that regulation."

"Thus, Mrs. Van Der Loo seems to have had no judicial decision upon her contention as to the proper interpretation of the regulation."

Fleming v. Van Der Loo, 160 F.(2d) 906, at 911, 912, 913. No Petition for Certiorari filed.

On August 15, 1947, the U. S. District Court of Appeals, 7th Circuit, in a case where the undoubted good faith of the defendant was proven, decided:

"We are not unmindful of the important role performed by plaintiff during and following the recent war and of the almost superhuman difficulties with which it was confronted. Neither are we unmindful of the difficulties confronting a person in business who honestly and in good faith attempted to comply with the innumerable price lists and regulations which were promulgated by the plaintiff. It is a matter of common knowledge that an individual merchant with two or three employees under his personal supervision was unable, however good his intentions, to achieve complete compliance in the matter of prices. Often he was confused and bewildered in an effort to interpret the regulations, much less obtain compliance. As the magnitude of a business increased, with its personal supervision further removed, we apprehend that the difficulties were correspondingly enhanced."

The Court dismissed the charges.

Porter v. Kroger Grocery and Baking Co., 163 F.(2d) 168, at 175(3), 177(5).

"A statute purporting to lay a tax may be so arbitrary and capricious that its enforcement would amount to deprivation of property without due process of law within the inhibition of the 5th Amendment. * * * It seems unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing * * * statutes direct themselves to future not to past transactions * * * If when the statute was passed it had been well recognized that Congress had no power to tax past gifts I think that we should have no trouble in reading the Act as meant to operate only from its date and only to tax gifts thereafter made. (148) * * * A reasonable interpretation is that the reduction and the tax operate alike on gifts after that date (149) * * * I think it tolerably plain that the Act should be read as referring only to transactions taking place after it was passed. (149)."

Blodgett v. Holden, 275 U.S. 142 at 146-149.

As was said by Mr. Justice Black:

"To construe the Constitution as preventing this would be to read it as a self-defeating charter. It has never been so interpreted. Since the decision in *McCullock v. Maryland*, 4 Wheat. (U.S.) 316, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution."

Case v. Bowles, 327 U.S. 92 at 102(11), 90 L. ed. at 560.

"The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action" * * * *"A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. United States v. Resnick*, 229 U.S. 207, 81 L. ed. 127, 57 S. Ct. 126." * * * *"And certainly a criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language."*

M. Kraus & Bros. v. U. S., Vol. 90, No. 11, U.S. S. Ct. (L. ed.) Adv. Dec. 653 at 656, 657, 659 (decided March 25, 1946).

As Mr. Justice Douglas says,

"Only in the event that the language of the Act was explicit would I assume that Congress intended even in days of war to interfere with

the traditional sovereignty of the States to the extent indicated."

Hulbert v. Twin Falls County, 327 U.S. 103 at 106, 90 L. ed. 562.

Mr. Justice Murphy has said in concurrence with Mr. Justice Douglas,

"A construction of the Act so as to insure due process of law and the protection of constitutional liberties is not an amendment of the Act. *It is simply a recognized use of the interpretative process to achieve a just and constitutional result* * * *."

Estep v. U. S., 327 U.S. 114 at 128, 90 L. ed. at 576.

"*Procedural due process undoubtedly requires that a hearing be accorded at some stage of an administrative proceeding.*"

Direct Realty Company v. Porter, 157 F. (2d) 434 at 439 (4).

"The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative preceeding so long as the requisite hearing is held before the final order becomes effective."

Opp. Cotton Mills v. Administrator, 312 U.S. 126, 152-153, 85 L. ed. 624.

Petitioner believes that the lower courts in the present case have raised the regulatory powers of the O.P.A. to the *nth* degree. It has taken an oral interpretation of an Order No. 3 which designates the selling price of Tom Burns Whiskey in Minneapolis, has added thereto the provisions of a Maximum Price Regulation 193, and then has coordinated those pro-

visions with a 2nd Maximum Export Price Regulation in order to obtain a "Maximum domestic price" in Seattle—where no liquor can be sold domestically under the law (R. 782-784). Such oral interpretation upon the witness stand differs in a range of $19000 to $58000 by O.P.A. officials and is $40000 more than the price as worked out by Petitioner in following practices of the trade established since 1934, which practices were advised and acquiesced in by all O.P.A. officials until the present case. No O.P.A. has ever dared to put into the form of an Order such interpretation of the Seattle price of the commodity. All O.P.A. officials agree that this whiskey was to be marketed in Alaska where no whiskey had a ceiling price. No common business man could ever know or learn how to figure a local ceiling price for his commodity from three such abtruse and uninterpretable regulations or orders as were used in this case.

The injustice in this case was further exemplified by the loss sustained by Petitioner. The record shows that this Petitioner complied at all times with the Regulations of the O.P.A. In accordance therewith he consulted on August 14, 1943, with John B. Sholley, Chief Price Attorney in the Seattle office of the O.P.A. Mr. Sholley gave to Petitioner his determination of the price at which the latter could sell the 1245 cases of pints and 736 cases of fifths of Tom Burns whiskey which he then had remaining as a balance on hand. All of such cases of whiskey were then sold by Petitioner to his Alaska customers at a few cents per case less than the price which Mr. Sholley said were the ceiling prices (R. 600-602).

Taking the Pre-Trial prices designated by Mr. Pearson, the trial attorney in this case, as being the alleged correct ceiling price, and by selling such remaining cases at the prices designated by Mr. Sholley, this Petitioner has sustained an actual loss of $18,020.25 (R. 600-602). This fact is undenied and not controverted.

In a court of equity there is an inherent right to offset inequity by granting equity. It would seem to be no more than right and proper that this loss of $18,020.25 suffered by Petitioner through the rendition by an authorized O.P.A. official of an erroneous price, should offset any claimed judgment for alleged overcharges innocently made by Petitioner herein.

As the United States Supreme Court has stated:

> "Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction and since the public interest is involved in a proceding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake" * * * "Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case.' It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest * * *. In addition, the court may go beyond the matters

immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. (p. 1089, headnote 1-5)

"Moreover the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary or inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, *securing complete justice*, should not be yielded to light inferences, or *doubtful construction*." (p. 1089, headnote 6-7) * * *. 'The problem of formulating these orders —under Section 205(a) E.P.A. Act of 1942— has been left to the judicial process of adapting appropriate equitable remedies to specific situations * * *. The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress * * *. (p. 1091, headnote 8-10 (a))

"It follows * * * the court has inherent power to bring in all interested parties and settle the controversies."

Porter v. Warner Holding Co., 60 Sup. Ct. 1086, 1089, 1090, 1091.

Consequently, if this Court deems that this Petitioner innocently and unknowingly has made overcharges justifying the imposition of a judgment herein, yet Petitioner respectfully appeals to the equitable

nature of the Chancellors to grant an offset in the said sum of $18,020.25 caused by the erroneous pricing technique of an authorized official of the O.P.A.

7. ADMINISTRATOR HAS NO RIGHT TO OVERTURN ESTABLISHED BUSINESS PRACTICES.

No proof has been affirmatively presented by the Respondent that there has been prior to the present action, any circumvention or evasion by this Petitioner or by anyone else of any regulation, order, price schedule, or requirement of the Emergency Price Control Act of 1942, which could furnish cause to the Administrator to change the "established business practice" of the liquor industry in Alaska. Such "established business practice" in this case had always used the "price at which acquired" section of the formula. It is specifically provided by the Act that

> "The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."
>
> Emer. Price Control Act of 1942, Sec. 2(h) (Public Law 421-77th Congress, Chap. 26, 2nd Session, H.R. 5990).

It is the undenied proof of Petitioner as set forth hereinbefore, that the method of fixing his cost prices for Tom Burns Whiskey sold by him in Alaska in 1943, followed the established business practices in the Alaska liquor industry first begun in the year 1934

and continued through the years until the establishment of ceiling prices for liquor in Alaska in 1944 (R. 400-403, 578, 582-583).

The decision of the Ninth Circuit Court of Appeals upon such point recites:

> "Another argument is that since Petitioner's methods of fixing his cost prices for Tom Burns whiskey followed the established business practices in the Alaskan liquor industry, the application of the regulation to him amounts to a violation of §2(h) of the Act. Assuming that the pricing practices pursued here were within the scope of that section, the argument amounts to an attack on the validity of the regulation. Such an attack is cognizable only in a proceeding in the Emergency Court. *Yakus v. United States*, 321 U.S. 414."

In answer thereto, as has been stated herein, no opportunity to use the right to appeal to the Emergency Court of Appeals was vouchsafed to Petitioner prior to the institution of the enforcement suit and the authorities above quoted have effectually disposed of the Court's statement by showing that this is not a question of "validity" but merely "applicability" of the regulation to Petitioner's case which can be disposed of in the enforcement action.

8. THE ADMINISTRATOR SHOULD NOT BE PERMITTED TO COLLECT TWICE FOR OVERCHARGES UPON THE SAME TRANSACTION.

The decision of the Ninth Circuit Court of Appeals recites:

> "In a suit concurrently brought against the K & L Distributors, appellant's suppliers, the

> Administrator sought judgment for the overcharges of these suppliers in making their sales to appellants. It is said that this amounts to an attempt to collect twice for overcharges growing out of the same transaction. We are unable to agree. In each of these instances a separate and distinct right of the government was violated. *United States v. Pan-American Petroleum Co.* (C.C.A. 9) 55 F.(2d) 753, 777."

In *United States v. Pan-American Petroleum Co.* (C.C.A. 9) 55 F.(2d) 753, above cited by the Court, there were two primary rights, one based upon conspiracy, and the other upon tortious damages, arising as to two different leases. In the present case, *K & L Distributors sold to Petitioner* at an alleged over-ceiling price. According to the decision of the lower court, *Petitioner bought from K & L Distributors* at the same alleged over-ceiling price. Such particular *and single* transaction constituted the *one* primary wrong. Payment by K & L Distributors pays the differential in the so-called "maximum domestic price" which constitutes the basic price upon which the over-ceiling price in our case is charged. Thus, the erroneous conclusion of the lower court above quoted results in the double payment to the O.P.A., a result not justified from the O.P.A. law of 1942, nor from any order, regulation, or price schedule of the Administrator.

In the companion case of *K & L Distributors v. Porter* (C.C.A. 9, No. 11429) it will be noted that the lower court assessed a claimed overcharge of $42,861.00 against the K & L Distributors. Such overcharge was based by the lower court upon the

contention that K & L Distributors had consummated a "domestic" sale of 6869 cases of Tom Burns whiskey to Al Shyman, doing business as Alaska Distributors Co., Petitioner herein, which cases of whiskey are the identical ones constituting the basis of Respondent's cause of action against this Petitioner.

By the payment of the judgment in the K & L Distributors' case, then the Respondent herein, will have received his full compensation for the difference between the alleged "domestic" price and the price which this Petitioner paid to K & L Distributors for such 6869 cases of liquor. Using the cases of fifths as an example, the alleged "domestic" price should have been $23.47 per case, whereas Petitioner paid $26.50 per case, an overcharge of $3.03 per case.

There is no contention that Petitioner overcharged in its method of figuring freight, handling, mark-up and other charges, which went into the final sales price to the Alaska customers. Such overcharges was entirely made up from purchasing at a claimed "illegal price." It should be noted again that the complaint charged Petitioner with *sales* at an illegal price and not with a "purchase at an illegal price." Otherwise at a price of $26.50 when he should have bought only at the alleged correct domestic price of $23.47.

But the Act does not contemplate that the Administrator can collect twice for the same wrong. The assessment of the $3.03 per case differential to K & L Distributors has thus satisfied the "maximum domestic price" which it is claimed this Petitioner should have paid, and thus makes legal and proper

the "price at which the commodity was acquired," or as said in Regulation No. 194, *supra*, "the actual cost to the seller of the commodity sold."

Having thus collected from another party the actual amounts which constituted this Petitioner's alleged overcharges, and without which there would have been no overcharges, it is equitable that this Court should exercise its powers of adjustment in rendering its decision. If that is done, there cannot be claimed any overcharges against this Petitioner and this case should be dismissed.

Such a result would thus bring into practical reality the doctrine of "fair play and substantial justice" designated by the United States Supreme Court.

> *International Shoe Co. v. State of Washington*, 66 S. Ct. 154 at 158.
>
> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. If this Court is to share the responsibility of enforcement, it should have in mind the large objectives of the Act. It should be concerned less with chastising the defendant according to a fixed administrative pattern and more concerned with preventing inflation * * *. It is important, therefore, in the enforcement of this statute that the power vested in this Court, be elastically exercised * * *."
>
> *Bowles v. L. D. McLean Co.*, 61 F. Supp. 454.

In determining liability to conform to a statutory standard of conduct, courts are practical and deal with

realities; they look through form to substance and examine the entire transaction.

Great Northern Co-op Ass'n. v. Bowles, 146 F.(2d) 269 at 271.

It is not intended hereby to qualify in any way the previous arguments hereinabove set forth wherein we have conclusively demonstrated, as we think, that the sale from K & L Distributors to Shyman was *not* a domestic sale but an export sale by such sellers to Shyman, an Alaska importer. But if it is held by this Court that such sale was a domestic sale, then having been paid for such overcharge, the Administrator should not be permitted, again, to collect the same overcharge.

PRAYER

It is therefore respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing said decision of the United States Circuit Court of Appeals for the Ninth Circuit.

Daniel B. Trefethen

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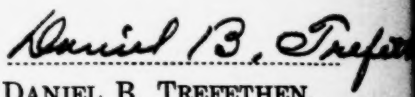
Attorney for Petitioner.

1466 Dexter Horton Building,
Seattle 4, Washington.

CERTIFICATE

The undersigned as counsel for Petitioner in the foregoing Petition for Writ of Certiorari, hereby certifies that said Petition is well founded and not interposed for delay.



DANIEL B. TREFETHEN,
Attorney for Petitioner.

November 1, 1947.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	4
Statement	10
Argument	12
Conclusion	29

CITATIONS

Cases:	
Alan Levin Foundation v. *Bowles*, 152 F. 2d 467	20
Batson v. *Porter*, 154 F. 2d 566	23
Bowles v. *Indianapolis Glove Co.*, 150 F. 2d 597, certiorari denied, 326 U. S. 794	20
Bowles v. *Seminole Rock Co.*, 325 U. S. 410	18, 25, 27
Diven v. *Porter*, 157 F. 2d 593	20, 21
Martini v. *Porter*, 157 F. 2d 35, certiorari denied *sub nom.* *Martini* v. *Fleming*, 330 U. S. 848	17
Mechanical Farm Equipment Distributors v. *Porter*, 156 F. 2d 296, certiorari denied, 329 U. S. 771	20
Porter v. *Crawford & Doherty Foundry Co.*, 154 F. 2d 431, certiorari denied, 329 U. S. 720	23
Schreffler v. *Bowles*, 153 F. 2d 1, certiorari denied, 328 U. S. 870	20
United States v. *Lutz*, 142 F. 2d 985	23
United States v. *Pan-American Petroleum Co.*, 55 F. 2d 753, certiorari denied, 287 U. S. 612	29
Wells Lamont Corporation v. *Bowles*, 149 F. 2d 364, certiorari denied, 326 U. S. 730	20
Yakus v. *United States*, 321 U. S. 414	18, 27
Statutes:	
Emergency Price Control Act of January 30, 1942, c. 26, 56 Stat. 23, as amended by the Act of June 30, 1944, c. 325, 58 Stat. 632 (50 U. S. C. App., Supp. V, 901 et seq.):	
Section 2 (h)	27
Section 4 (a)	23
Section 204 (e) (1)	27
Section 205 (a)	11
(b)	23
(e)	4, 25
Section 302 (i)	22
Washington State Liquor Act, §49 (Rem. Rev. Stats. (Supp.), §7306–49)	15

Regulations: Page
Maximum Price Regulation 193, Order No. 3 29
Maximum Price Regulation 194 (7 F. R. 5909), as amended (8 F. R. 856):
Section 1418.61 ..... 7, 8, 17
Section 1418.63 (5) 8, 16, 17
Revised Procedural Regulation 1 (7 F. R. 8961):
Section 1300.51 ..... 8, 20
Section 1300.52 ..... 9, 20
Second Revised Maximum Export Price Regulation (8 F. R. 4132):
Section (3) (a) (1) 5, 18, 19, 22, 24, 27
Section 4 (a) 6, 19, 24
Section 4 (b) 6, 19
Section 11 ..... 7, 12
Third Revised Maximum Export Price Regulation (11 F. R. 9069) 21
Miscellaneous:
3 Pike and Fischer OPA Price Service (General Desk Book) 15,227 21
RPI [Recent Price Interpretation] No. 17 (3 Pike and Fischer OPA Service 20: 303) 24
Rule 52 (a), F. R. Civ. P., 28 U. S. C. following § 723c 15

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 433

ALFRED SHYMAN, DOING BUSINESS UNDER THE ASSUMED NAME, BUSINESS AND STYLE OF ALASKA DISTRIBUTORS COMPANY, PETITIONER

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 813–823) is not reported. The opinion of the circuit court of appeals (R. 831–837) is reported at 163 F. 2d 461.

JURISDICTION

The judgment of the circuit court of appeals was entered August 15, 1947 (R. 838), and a petition for rehearing was denied October 8, 1947 (R. 839). The petition for a writ of certiorari was filed November 6, 1947. The jurisdiction of

this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioner's sales of the whiskey involved to purchasers in Alaska were export sales within the meaning of the Second Revised Maximum Export Price Regulation.

2. Whether it was correctly determined that the Second Revised Maximum Export Price Regulation, and not Maximum Price Regulation 194, was applicable to the sales in question.

3. Whether the fact that the Second Revised Maximum Export Price Regulation established merely a formula for calculating dollars-and-cents ceiling prices, and did not expressly fix such prices, prevented a determination that the prices charged by petitioner exceeded the ceilings so determinable.

4. Whether, in view of the fact that petitioner was entitled to secure an authoritative written interpretation, binding on the Administrator, as to what his dollars-and-cents ceiling prices were under the Second Revised Maximum Export Price Regulation, he could be heard to complain, after violation of the regulation, that the ascertainment of his ceilings from the formula provided was too complicated a process for him to have been expected to perform.

5. Whether the term "price at which the com-

modity was acquired" as used in Section 3 (a) (1) of the Second Revised Maximum Export Price Regulation, defining one of two alternative "basic prices" to which an exporter might make certain designated additions in calculating his ceiling export prices, was intended to include an illegal, or over-ceiling price paid by the exporter for the commodity he exports.

6. Whether the fact that petitioner's overcharges were not wilful or the result of failure to take practicable precautions against making the overcharges was a bar to a judgment for the Government in the amount of the overcharges, no penalty in the way of treble damages being exacted.

7. Whether petitioner's contention that Section 3 (a) (1) of the Second Revised Maximum Export Price Regulation, as construed below, operated to "compel changes in the business practices" of the liquor industry in Alaska, in violation of Section 2 (h) of the Emergency Price Control Act, constituted an attack on the validity of the regulation, cognizable only in the Emergency Court of Appeals.

8. Whether the Government's recovery against petitioner of the amount of petitioner's overcharges, as well as the recovery against petitioner's supplier of the amount of the latter's overcharges on the same whiskey, constituted a double recovery upon the same transaction.

STATUTE AND REGULATIONS INVOLVED

Section 205 (e) of the Emergency Price Control Act of January 30, 1942, c. 26, 56 Stat. 23, as amended by the Act of June 30, 1944, c. 325, title I, § 108 (b), 58 Stat. 632 (50 U. S. C. App., Supp. V, 925 (e)), provided in pertinent part as of July 31, 1944, the date of the institution of the proceeding involved herein:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was

> neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

The Second Revised Maximum Export Price Regulation (8 F. R. 4132) provided in pertinent part, during the period of the alleged overcharges involved herein (April to September 1943):

> Sec. 3. *Maximum export prices for export sales* * * *. On and after April

5, 1943, * * * no exporter or other seller in a transaction dealt with below shall sell, offer to sell, transport, ship, or participate in the transportation or shipment of, any commodity at a price in excess of the following maximum prices:

(a) In the case of an exporter other than the manufacturer or producer of the commodity the maximum export price shall be either:

(1) The price at which the commodity was acquired or the maximum domestic price which would be applicable to a current sale of the commodity to the exporter by the supplier thereof, plus the additions thereto authorized by paragraphs (a) and (b) of section 4 and less the deductions provided by section 5 (a); * * *.

* * * * *

Sec. 4. *Export premiums and allowable expenses on export sales* * * *. (a) An amount * * * not in excess of 125 per cent of the average premium charged in the export trade during the period July 1 to December 31, 1940 for the particular services or functions performed, or 125% of the average premium charged in the export trade during the period March 1 to April 15, 1942, for the particular services or functions performed, whichever figure is the lower, may be added by the exporter to his maximum domestic price or other basic price, as provided in section 3 of this regulation. * * *

(b) An amount may be added by the ex-

porter to his basic price to compensate for expenses, such as freight, marine and war risk insurance, consular fees, freight forwarders' fees, packing costs in excess of those incurred on domestic sales, demurrage charges, and other shipping charges, incident to exporting the commodity and incurred or to be incurred by the exporter. * * *

* * * * *

Sec. 11. *Definitions.* (a) When used in this maximum export regulation the term:

(1) "Export" or "export sale" means:

(i) Any sale of a commodity by a seller or his agent in the continental United States to a purchaser outside thereof in which the selling or invoicing is done in the continental United States, or is done outside the continental United States on behalf of a principal or parent firm in the continental United States, and the commodity sold is or has been transported from the continental United States to a point outside thereof;

* * * * *

(3) "Continental United States" means only the forty-eight States and the District of Columbia.

* * * * *

(7) "Basic price" shall mean the cost of acquisition or other domestic price referred to in section 3 of this regulation.

* * * * *

Maximum Price Regulation 194 (7 F. R. 5909),

as amended (8 F. R. 856), provided in pertinent part during the period of the alleged overcharges involved herein:

> § 1418.61 *Applicability of other maximum price regulations.* The provisions of this Maximum Price Regulation No. 194 supersede the provisions of all other maximum price regulations, except where other maximum price regulations provide that notwithstanding Maximum Price Regulation No. 194 such other regulations shall be applicable in the Territory of Alaska.
>
> * * * * *
>
> § 1418.63 *Definitions.* When used in this Maximum Price Regulation No. 194, the term:
>
> * * * * *
>
> (5) "Sales and deliveries to a buyer in the Territory of Alaska" does not include sales from a seller outside the Territory of Alaska to a purchaser in the Territory of Alaska. Export sales, from a seller in the Continental United States to a purchaser in Alaska shall be governed by the maximum prices established for export sales by the Revised Maximum Export Price Regulation.
>
> * * * * *

Revised Procedural Regulation 1 (7 F. R. 8961) provided in pertinent part during the period of the alleged overcharges involved herein:

> § 1300.51 *Interpretations.* An interpretation rendered by an officer or employee

of the Office of Price Administration with respect to any provision of the Act or of any regulation, price schedule, order, requirement, or agreement thereunder, will be regarded by the Office of Price Administration as official only if such interpretation was requested and issued in accordance with § 1300.52 of this regulation. Action taken in reliance upon and in conformity with an official interpretation and prior to any revocation or modification thereof or to any superseding thereof by regulation, order or amendment, shall constitute action in good faith pursuant to the provision of the Act, or of the regulation, price schedule, order, requirement or agreement to which such official interpretation relates. An official interpretation shall be applicable only with respect to the particular person to whom, and to the particular factual situation with respect to which, it is rendered, unless publicly announced as an interpretation of general application.

§ 1300.52 *Requirements governing interpretations*—(a) *Requests for interpretations; form and contents.* Any person desiring an official interpretation of the Emergency Price Control Act of 1942 or any regulation, price schedule, order, requirement or agreement thereunder, shall make a request in writing for such interpretation. Such request shall set forth in full the factual situation out of which the interpretative question arises and shall, so far as is practicable, state the names and

post office addresses of the persons involved. If the inquirer has previously requested an interpretation on the same or substantially the same facts, his request shall so indicate and shall name the official or office to whom his previous request was addressed. * * *

(b) *Interpretation to be written; authorized officials.* Official interpretations shall be given only in writing, signed by one of the following officers of the Office of Price Administration: the Price Administrator, the General Counsel, any Associate or Assistant General Counsel, any Regional Attorney, any Regional Price Attorney, any State Attorney, or State Price Attorney and any Chief Attorney or Chief Price Attorney for a District Office: *Provided,* That interpretations of general application shall be announced only by the Price Administrator, the General Counsel, any Associate or Assistant General Counsel, or any Regional Attorney. * * *

STATEMENT

On July 31, 1944, the Price Administrator filed an amended complaint in the District Court for the Western District of Washington, pursuant to Section 205 (e) of the Emergency Price Control Act of 1942, as amended (*supra,* pp. 4–5), alleging export sales of "Tom Burns" whiskey by petitioner at prices in excess of the maximum prices established by Section 3 (a) (1) of the Second Revised Maximum Export Price Regulation

(*supra,* pp. 5–6), and praying for the recovery of treble the alleged overcharges of $53,708.49, or $161,125.47 (R. 5–9).[1]

Following a trial before the court without a jury, the district court found that petitioner was, during the period of the alleged overcharges (April to September 1943), a resident of Seattle, Washington, engaged in the business of exporting "Tom Burns" whiskey to purchasers in Alaska (Finding of Fact III, R. 57–58); that the provisions of the Second Revised Maximum Export Price Regulation applied to the shipment and sale of the whiskey to such Alaska purchasers and that petitioner was permitted to charge these purchasers no more than the prices established by that regulation (Finding of Fact V, R. 58); that under the provisions of the regulation, the total maximum export price chargeable by petitioner to the Alaska purchasers was $242,034.76 (Finding of Fact IX, R. 61); that the total prices actually charged by petitioner between April 29 and September 1, 1943, amounted to $263,844.65 (Finding of Fact VII, R. 59–60); that the amount received by petitioner from these sales exceeded the lawful ceilings by $21,809.89 (Finding of Fact

[1] The complaint also sought injunctive relief against further violations, under Section 205 (a) of the Act (50 U. S. C. App., Supp. V, 925 (a)), but this aspect of the complaint need not be considered, since the cessation of price control over sales of whiskey has, as the court below points out (R. 837), rendered moot questions raised as to the injunctive relief granted by the district court.

X, R. 61); and that none of the overcharges were wilful or the result of failure to take practicable precautions against making them (Finding of Fact XI, R. 61). The court concluded that the Government should have judgment for "single the amount of said overcharges," or $21,809.89 (R. 62). On appeal, this judgment was affirmed (R. 838).

Other pertinent facts are stated in the Argument, *infra*, keyed to the contentions to which they are relevant.

ARGUMENT

1. Petitioner contends, as he did in both courts below, that his sales to his Alaska customers were not export sales, but sales consummated within the Territory of Alaska, and that therefore the Second Revised Maximum Export Price Regulation did not apply to them. His theory is that K & L Distributors, Seattle wholesale liquor dealers from whom he bought the whiskey, exported it to him in Alaska and that his sales occurred entirely within Alaska. (Pet. 39–49; see R. 35.) The contention is without merit.

Section 11 of the Second Revised Maximum Export Price Regulation (*supra*, p. 7) defined an "export sale" to mean "Any sale of a commodity by a seller or his agent in the continental United States [defined as "the forty-eight States and the District of Columbia"] to a purchaser outside thereof in which the selling or invoicing is

done in the continental United States, * * * and the commodity sold is or has been transported from the continental United States to a point outside thereof." That petitioner's sales fell squarely within this definition is clear both from the stipulated facts and from the evidence adduced at the trial.

It was stipulated prior to the trial that petitioner was a resident of Seattle and maintained an office there (R. 37); that he purchased the whiskey in question from K & L Distributors in Seattle and received it in Seattle (R. 37–38); that the shipping documents covering the whiskey were turned over to petitioner in Seattle (R. 49); that petitioner owned the whiskey prior to its shipment to Alaska and that it was withdrawn from a bonded warehouse in Seattle on petitioner's orders and thereafter shipped to purchasers in Alaska in shipping space secured by petitioner at Seattle (R. 38–39, 50); that the original bills of lading covering the whiskey were forwarded by the warehouse to petitioner in Seattle, whence petitioner forwarded them to his customers in Alaska (R. 51); that the billing and invoicing to the Alaska purchasers was done by petitioner in Seattle (R. 39); and that the proceeds of such sales were remitted to petitioner at his office in Seattle (R. 39).

In addition to these stipulated facts, the following evidence was adduced at the trial. On petitioner's application, dated June 11, 1940, for a

wholesaler's basic permit under the Federal Alcohol Administration Act as successor in interest to Alaska Distributors, Inc., petitioner referred to himself as "A. Shyman, sole proprietor with principal office at 911 Western Avenue, Seattle, Washington" (Plaintiff's Ex. 8).[2] Petitioner was a successor to Alaska Distributors, Inc., a corporation formed under the laws of Washington in 1934 (R. 416) and under petitioner's prior control (R. 400). Petitioner's alleged principal Alaskan agent, one Meherin, listed his own name on order blanks, followed by the designation, "Merchandise Broker, Juneau, Alaska," and wrote orders in his own name, not as petitioner's agent (R. 419, 427). Petitioner's name was not even in the telephone directory in Juneau, Alaska, where his main office was alleged at the trial to be located (R. 418). Petitioner's standard letterhead read, "Alaska Distributors Company,[2] Importers, Wholesalers, Distillery Representatives, Maritime Building * * * Seattle, Washington" (R. 419). Petitioner kept no warehouse stocks in Alaska (R. 430). He paid social security taxes to the State of Washington on the salaries of three employees he had in his Seattle office (R. 433). His office expenses in Seattle were considerably more than in Juneau, Alaska (R. 434). On his application, dated December 30, 1942, for renewal of his whole-

[2] The exhibits are on file with the circuit court of appeals. It is stated in respondent's brief below that this exhibit contains the quoted language.

sale liquor license in Alaska, in response to the question as to how long he had been a resident of the "Territory of Alaska," petitioner merely wrote "Seattle, Washington" (Shyman Ex. 23, R. 47).

It is clear, therefore, that the sales here involved were not sales by a seller in Alaska to buyers in Alaska, but sales by a seller in Seattle to purchasers outside continental United States in which "the selling or invoicing" was done in continental United States, and hence were "export sales" within the definition of that term as used in the Second Revised Maximum Export Price Regulation. The district court summarized in detail the pertinent evidence (R. 813–815) and stated as its "finding, conclusion and decision" that petitioner was "at all times material to these actions doing business as an exporter in Seattle, Washington" (R. 813; see also Finding of Fact III, R. 57–58). This finding, as we have shown, is clearly supported by the evidence and must, therefore, be sustained. Rule 52 (a), F. R. Civ. P., 28 U. S. C. following § 723 c.[3]

[3] Petitioner insists, however, that if his sales to his Alaska customers be construed as export sales, the sales to him by his supplier, K & L Distributors, must necessarily be deemed to have been domestic sales consummated in the State of Washington; that under the laws of Washington, a "monopoly" state, such domestic sales could legally be made only by the State Liquor Control Board; that the finding that petitioner's sales were export sales, therefore, necessarily involved a determination that K & L Distributors violated state law; and that, consequently, the finding was erroneous (Pet. 39–49). This contention is clearly without merit.

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2. Petitioner further contends that the district court erred in determining that the Second Revised Maximum Export Price Regulation applied to his sales to Alaska purchasers because an entirely different regulation, Maximum Price Regulation 194, was applicable to sales in Alaska (Pet. 19–21, 89–94). This contention is likewise unsound, since § 1418.63 (5) of Maximum Price Regulation 194 (*supra*, p. 8) specifically provided that " 'Sales and deliveries to a buyer in the Territory of Alaska' does not include sales

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Section 49 of the Washington State Liquor Act (Rem. Rev. Stats. (Supp.), § 7306–49) provides that "Nothing in this act shall prevent the transshipment of liquor in interstate and foreign commerce." The sales of the liquor in question by K & L Distributors to petitioner were specified to be "For export to Alaska only" (R. 177, 339, 364, 397). It was stipulated, moreover, that upon arrival of the liquors in question in Seattle they "were warehoused in their original packages as provided by the rules and regulations of the Washington State Liquor Control Commission and the laws of the State of Washington"; that the liquor was thereafter segregated into lots by petitioner in conformity with the orders forwarded by petitioner's agents in Alaska and shipped to the Alaska purchasers; and that none of the liquor in question "was consumed or used in the State of Washington, nor sold to anyone for use in the State of Washington" (R. 42). Clearly, therefore, there is no basis for concluding that, under the district court's interpretation of petitioner's sales as export sales, the sales by K & L Distributors to petitioner necessarily violated Washington's liquor laws, since those sales were made for immediate resale outside of Washington. And in any event, even assuming, *arguendo*, that the sales to petitioner were necessarily in violation of Washington law if the sales by petitioner were export sales, it obviously does not follow from that fact that petitioner's sales could not be found to be export sales where, as here, the evidence was overwhelming that they were such.

from a seller outside the Territory of Alaska to a purchaser in the Territory of Alaska. Export sales, from a seller in the Continental United States to a purchaser in Alaska shall be governed by the maximum prices established for export sales by the Revised Maximum Export Price Regulation." The Second Revised Maximum Export Price Regulation was, of course, merely a revision of the regulation thus specifically declared to be applicable to export sales to Alaska.[4]

3. Petitioner further contends that, since neither the Second Revised Maximum Export Price Regulation nor any written order thereunder established dollars-and-cents ceiling prices for the export sale of whiskey, there could exist no valid basis for the charge that he violated the regulation (Pet. 31–39). The regulation, however, set up a formula for calculating dollars-and-cents ceiling prices, and that was enough. *Martini* v. *Porter,* 157 F. 2d 35, 39 (C. C. A. 9), certiorari denied *sub nom. Martini* v. *Fleming,* 330 U. S. 848. Manifestly, the mere fact that the Admin-

[4] Petitioner insists (Pet. 20–21), however, that § 1418.61 of Maximum Price Regulation 194, which was added by Amendment No. 10 (8 F. R. 856), and provided that "The provisions of this Maximum Price Regulation No. 194 supersede the provisions of all other maximum price regulations, except * * *" (*supra*, p. 8), had the effect of canceling the provision contained in § 1418.63 (5). But the obvious purpose of § 1418.61 was to make Maximum Price Regulation 194 the only regulation applicable to those sales in Alaska which were covered by it. That regulation plainly did not purport to apply to export sales to Alaska, as shown by the clear terms of § 1418.63 (5).

istrator had specified dollars-and-cents ceiling prices in other regulations did not, as petitioner seems to assume (Pet. 32–34, 39), make the establishment of dollars-and-cents ceiling prices essential to the validity of all maximum price regulations. Furthermore, as pointed out by the court below (R. 833–834), and notwithstanding petitioner's present assertion that the court below misconceived the nature of this contention (Pet. 31–32), the "gist of this argument is that the Administrator was without power to establish maximum prices by formula, * * *. A short answer to the argument is that it amounts to an attack on the validity of the regulation cognizable only in the Emergency Court of Appeals." See *Bowles* v. *Seminole Rock Co.,* 325 U. S. 410, 418–419; *Yakus* v. *United States,* 321 U. S. 414, 427–431.

4. It was stipulated prior to the trial that petitioner's sales of whiskey to his Alaska customers consisted of 2,264 cases of fifth-gallons at $33.10 per case, 1,500 cases of quarts at $40.55 per case, and 3,105 cases of pints at $41.25 per case (R. 38). Patrick Geraghty, an O. P. A. price attorney (R. 713), testified that, using "the maximum domestic price which would be applicable to a current sale of the commodity to the exporter by the supplier thereof" (the second alternative "basic price" that an exporter might use under Section 3 (a) (1) of the Second Revised Maximum Export Price Regulation, *supra,* p. 6) as the

"basic price" applicable to export sales of the whiskey involved (see R. 753–754, 756–757), the prices actually charged by petitioner exceeded his legal ceilings by $2.51 per case for the fifth-gallons, $3.61 per case for the quarts, and $3.45 per case for the pints, amounting to a total overcharge, for all cases of all types, of $21,809.89 (R. 766–768). This total overcharge was the amount of overcharge found by the court (Finding of Fact X, R. 61) and awarded as damages (R. 62). Geraghty's determination of the overcharges necessarily involved a number of mathematical calculations (see R. 719–755, 763–768). Petitioner contends that, because of the complicated nature of the mathematical processes required to be applied to arrive at the amount of his total overcharge and because there had been differences of opinion among different O. P. A. attorneys as to the exact amount of his overcharges,[5] he was entitled, prior to his making of

[5] Geraghty's figure of $21,809.89 as the amount of petitioner's overcharges, which amount the court accepted as the actual overcharge, was lower than the figure arrived at by any other O. P. A. attorney (see Pet. 52–53). The figure "$19,542.12," which petitioner states was Geraghty's result "if $1.25 was added to basic price and mark-up allowed thereon" (Pet. 53), was reached in answer to a hypothetical question of petitioner's counsel which assumed that the amount authorized by Section 4 (b) of the Second Revised Maximum Export Price Regulation (*supra*, pp. 6–7) to be added to the "basic price" defined in Section 3 (a) (1) was to be added before taking the percentage mark-up specified in Section 4 (a) (see R. 757–761). However, Geraghty testified that this assumption involved an incorrect interpretation of

the sales in question, to "a written interpretation by some authorized O. P. A. official" advising him of his legal dollars-and-cents ceilings under the law, and should not have been required to wait until the trial to be advised of what his ceilings were (Pet. 50–53) . As the court below pointed out (R. 834), however, in answer to petitioner's contention that "the formula prescribed was so vague and complex that [he] was unable to ascertain the applicable ceiling prices for his product," petitioner could at any time have applied to the Administrator for an authoritative written interpretation, binding on the Administrator, to resolve his uncertainty. See Revised Procedural Regulation 1, §§ 1300.51, 1300.52, *supra,* pp. 8–10; *Diven* v. *Porter,* 157 F. 2d 593, 595 (C. C. A. 8); *Mechanical Farm Equipment Distributors* v. *Porter,* 156 F. 2d 296, 298 (C. C. A. 9), certiorari denied, 329 U. S. 771; *Schreffler* v. *Bowles,* 153 F. 2d 1, 4 (C. C. A. 10), certiorari denied, 328 U. S. 870; *Alan Levin Foundation* v. *Bowles,* 152 F. 2d 467, 472 (E. C. A); *Bowles* v. *Indianapolis Glove Co.,* 150 F. 2d 597, 601 (C. C. A. 7), certiorari denied, 326 U. S. 794; *Wells Lamont Corporation* v. *Bowles,* 149 F. 2d 364, 367 (E. C. A.), certiorari denied, 326 U. S. 730. Since he chose not to do so, he cannot now be heard to complain that the

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the order in which the additions defined in Sections 4 (a) and 4 (b) were to be made (R. 759). It seems plain that Geraghty's interpretation—that the 4 (a) mark-up was to be taken before the 4 (b) addition—is the only correct one.

ascertainment of his dollars-and-cents ceilings was too complicated a process for him to have been expected to perform. Furthermore, the court awarded as damages only the exact amount of the overcharge, and did not penalize petitioner by the exaction of treble damages. Hence, petitioner clearly has no cause for complaint, since the judgment of the court merely compelled him to surrender that which he had unlawfully received and to which he was never entitled. *Diven* v. *Porter, supra,* 595.

5. Petitioner next contends that, even though his sales to his Alaska customers may have been at prices in excess of the lawful ceilings determinable under Section 3 (a) (1) of the Second Revised Maximum Export Price Regulation if the second, or "maximum domestic price" alternative is used as the basic price to which the indicated additions might lawfully be made, his prices were below the legal ceilings determinable by using the first (i. e., the "price at which the commodity was acquired") alternative basic price (Pet. 49–87).[6]

[6] The purpose of giving an exporter this choice of basic prices was to protect him against the possibility of a reduction in the maximum domestic price legally chargeable for the commodity in question between his acquisition of the commodity and his shipment thereof out of the country. The Third Revised Maximum Export Price Regulation eliminated the "cost of requisition" optional basic price (see 11 F. R. 9069, 9070). The Statement of Considerations for the latter regulation stated (3 Pike and Fischer O. P. A. Price Service (General Desk Book) 15,227):

"The old regulation protected an exporter who purchased

However, the prices at which petitioner purchased the whiskey from his supplier, K & L Distributors, were themselves above-ceiling prices, and hence illegal (R. 818, 820, 834–835). Petitioner points out that the first alternative basic price provided for in Section 3 (a) (1) read, "The price at which the commodity was acquired" and did not by its terms exclude an over-ceiling price (Pet. 61). "It would have been a simple matter," petitioner reasons, "to insert the word 'legal' in the context of Sec. 3 (a) (1) to read 'The (legal) price at which the commodity was acquired' if the Administrator had intended to bar Petitioner, or others" (*ibid.*). Thus, petitioner's contention, in substance, is that the first alternative basic price defined in Section 3 (a) (1) must be construed as though it read "The price at which the commodity was acquired, whether that price was legal or illegal." The contention is palpably unsound for several reasons.

(a) First, the Regulation must be read in the light of the language of the Act itself, which defines "maximum price" as the "maximum lawful price" chargeable for a commodity (Section 302 (i), 50 U. S. C. App., Supp. V, 942 (i)).

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a commodity for shipment and thereafter before shipment found that basic maximum prices were reduced. With the shipping situation returning to normal this protection is no longer considered necessary and therefore the option of using the cost of acquisition as a basis in computation of maximum export prices has been eliminated."

(b) Secondly, Section 4 (a) of the Act (50 U. S. C. App., Supp. V, 904 (a)) prohibits not only the sale, but likewise the purchase of a commodity in excess of the maximum prices established by a regulation. Under petitioner's theory, a purchaser who "joyfully may have aided the seller in violating the law" (*Porter* v. *Crawford & Doherty Foundry Co.*, 154 F. 2d 431, 434 (C. C. A. 9), certiorari denied, 329 U. S. 720) would nevertheless be permitted to benefit from his own wrong. Indeed, petitioner's view would necessitate the anomalous conclusion that a person would be criminally liable under Section 205 (b) of the Act (50 U. S. C. App. Supp. V, 925 (b)) for a wilful "purchase" contrary to Section 4 of the Act (see *United States* v. *Lutz*, 142 F. 2d 985, 989 (C. C. A. 3)), and yet at the same time be wholly free from civil liability upon a resale. Clearly, if a purchaser unlawfully pays more than the ceiling price for a commodity and thereby invokes criminal sanctions, the unlawful character of the price paid is not lost in any way when passed on to another purchaser so as to bar resort to civil damages. The contrary is the case, since such a purchaser not only violates the law himself, but furnishes to other "dealers a motive to violate the statute themselves" (*Batson* v. *Porter*, 154 F. 2d 566, 568 (C. C. A. 4)).

(c) Thirdly, if petitioner's construction of the regulation were correct, it would not only have been to his advantage to pay illegal prices for

whiskey in a scarce market in order to obtain it to the exclusion of others who were willing to pay only the ceiling price, but there would have been the additional advantage of receiving larger dollar profits on resales. For, under petitioner's view, the mark-up or export premium permissible on export sales under Section 4 (a) of the regulation (*supra*, p. 6) could be placed upon the excess price paid by petitioner to his supplier instead of upon the ceiling price at which the latter was lawfully entitled to sell to petitioner. Hence, if petitioner's interpretation of Section 3 (a) (1) is correct, there would have been every incentive to exporters to encourage their suppliers to sell to them at over-ceiling prices, or at least close their eyes to such violations, instead of cooperating in the fight against inflation, since they would have had everything to gain and nothing to lose by such a course of conduct.

(d) Finally, petitioner's interpretation of the meaning of the term "price at which the commodity was acquired," as used in Section 3 (a) (1), is directly refuted by an official published interpretation which has been in existence since November 25, 1942. This interpretation, referred to as RPI [Recent Price Interpretation] No. 17, was issued in connection with Revised Maximum Export Price Regulation, and is published in 3 Pike and Fischer O. P. A. Service 20: 303–304 (see R. 696). It reads as follows:

> *Cost of acquisition—illegal price.* A non-manufacturing exporter, in figuring his cost of acquisition, may not use a price which violated a domestic Regulation at the time he purchased the commodity. The provision, in the Regulation referring to "the price at which the commodity was acquired for export" does not include an illegal price.

While it is true that this interpretation was not published in the Federal Register, there is no requirement that it must have been so published to permit resort to it as an aid in determining the intent of Section 3 (a) (1). Compare *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 417, where a bulletin issued by the Price Administrator, but which was not published in the Federal Register, was considered as an aid to ascertaining the Administrator's intent.

For the above reasons, as well as for the reasons mentioned in the opinion below, the circuit court of appeals was clearly correct in ruling that "the phrase 'the price at which the commodity was acquired' cannot fairly be construed to include an over-ceiling price" (R. 835).

6. There is no merit in petitioner's further contention that "The present decision gives no consideration to the good faith exercised by Petitioner in this case" (Pet. 21, 95–106). Section 205 (e) of the Emergency Price Control Act (*supra*, pp. 4–5), under which the proceeding involved was brought, makes a seller who has sold

at over-ceiling prices liable for an amount up to treble the amount of the overcharge, the exact amount to be fixed at the court's discretion, with the proviso, however, that the amount recoverable "shall be the amount of the overcharge * * * if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation." The district court found that petitioner's overcharges were not wilful or the result of failure to take practicable precautions (Finding of Fact XI, R. 61), and accordingly gave judgment for "single the amount of said overcharges" (R. 62). Manifestly, therefore, the judgment was fully authorized by the statute, and petitioner has been required to surrender only the amount which he unlawfully received and to which he was never entitled.[7]

[7] Petitioner's contention that he should have been allowed an offset of $18,020.25 against the judgment for overcharges because he sold other whiskey than that here involved at prices lower than his legitimate ceilings as the result of receiving erroneous advice from an O. P. A. attorney in respect of such ceilings (Pet. 103–106) is equally without merit. Petitioner did not inquire of any O. P. A. representatives concerning the proper method by which to establish ceiling export prices on this whiskey until August 14, 1943, by which time most of the sales involved in this case had been completed (R. 624–625). Shortly before this date, on August 7, 1943, K & L Distributors had advised petitioner that his prices to Alaska purchasers had been illegal (R. 624). During the entire period, as we have pointed out above (*supra*, p. 20), petitioner had it within his power to apply in

7. Petitioner further contends (Pet. 106–107) that Section 3 (a) (1) of the Second Revised Maximum Export Price Regulation, as construed, operated to "compel changes in the business practices" of the liquor industry in Alaska, in violation of Section 2 (h) of the Act (50 U. S. C. App., Supp. V, 902 (h)). It is unnecessary to consider the merits of such a charge, however, since, as the court below points out (R. 836), "the argument amounts to an attack on the validity of the regulation. Such an attack is cognizable only in a proceeding in the Emergency Court [of Appeals]." See *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 418–419; *Yakus* v. *United States*, 321 U. S. 414, 427–431. Petitioner's rejoinder that "no opportunity to use the right to appeal to the Emergency Court of Appeals was vouchsafed to Petitioner prior to the institution of the enforcement suit" (Pet. 107) is obviously meritless in view of the explicit terms of Section 204 (e) (1) of the Act (50 U. S. C. App., Supp. V, 924 (e) (1)), providing that "* * * within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 [the section under which the instant proceeding was instituted] involving alleged violation of

writing for an official written interpretation binding upon the Administrator and was not compelled to rely on the alleged oral conversations. The consequences flowing from petitioner's failure to do what the law required can, therefore, be placed upon no one but himself.

any provision of any regulation or order * * * or of any price schedule * * *, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated." Clearly, therefore, petitioner had ample opportunity to contest the validity of the regulation in question before the Emergency Court of Appeals if he desired to do so.

8. Finally, petitioner contends that it was error for the district court to permit the Government "to collect twice for overcharges upon the same transaction" (Pet. 107–111). This contention is based on the fact that in a proceeding against petitioner's supplier, K & L Distributors, which action was consolidated for trial with the instant action (R. 157, 164), and which also resulted in a judgment for the Government, the alleged violation consisted of overcharges in the sales made by K & L Distributors to petitioner of the same whiskey as that involved in the present case (R. 837). While the whiskey involved in the two proceedings was the same, however, the two causes of action obviously arose from entirely different transactions and related to different persons. The two cases, moreover, involved different regulations. The regulation involved in the proceeding against K & L Distributors was Order No. 3 to

Maximum Price Regulation 193 (R. 158), whereby maximum domestic prices were established on the specific brand of whiskey, Tom Burns, involved herein (R. 58–59). In the instant case, as we have seen, the violations arose from the fact that petitioner exported the whiskey to purchasers outside the continental limits of the United States at prices in excess of those determinable from the Second Revised Maximum Export Price Regulation. Petitioner's contention is without merit, therefore, since a "separate and distinct primary right of the government was involved" in each case. *United States* v. *Pan-American Petroleum Co.*, 55 F. 2d 753, 777 (C. C. A. 9), certiorari denied, 287 U. S. 612.

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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In the

Supreme Court of the United States

OCTOBER TERM, 1947

ALFRED SHYMAN, doing business under the assumed name, business and style of ALASKA DISTRIBUTORS COMPANY,
Petitioner,

vs.

PHILIP B. FLEMING, Temporary Controls Administrator,
Respondent.

PETITIONER'S REPLY BRIEF

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INDEX

Page

Reply Argument 1
Prayer 15

TABLE OF CASES

Anchorage Grocery Co., In re, Opinion on Order Denying Protest, Docket No. 1288-2-P., April 6, 1945. 3 Opinions and Decisions of Administrator, 3 O.P.A. Service, pp. 156-157..... 6
Bowles v. Seminole Rock Co., 325 U.S. 410, 417.... 13
Fleming v Van der Loo, 160 F.(2d) 911-913.....14
Otto Kraft & Sons, In re, Opinion on Order Denying Protest, Docket No. 1288-3-P., May 12, 1945. 3 Opinions and Decisions of the Administrator, 3 O.P.A. Service, pp. 223-224..... 6
U. S. v. Lutz (C.C.A. 3) 143 F.(2d) 985, 989..... 11

STATUTES AND REGULATIONS

Emergency Price Control Act of 1942 (50 U.S. C.A. 901, *et seq.* §1(a).....2, 7, 13
§2(a) 2
§4(a) 2
Maximum Price Regulation 194 (7 F.R. 5909)..5, 6, 7
Amendment 10 6
Maximum Price Regulation 445.....10, 12
Second Revised Maximum Export Price Regulation (8 F.R. 4132).....2, 4, 6, 7, 12
Third Revised Maximum Export Price Regulation 10
Revised Procedural Regulation 1 (7 F.R. 8961)..9, 11

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PETITIONER'S REPLY BRIEF

REPLY ARGUMENT

In reply to the factual statements and arguments presented by Respondent in this case, this Petitioner will endeavor to follow Respondent's presentation of its case, by specific reference to pages of Respondent's Brief. Respondent has in no way adverted to any of the legal authorities presented by Petitioner, but apparently has merely reiterated the arguments made by Respondent in the Answering Brief before the Ninth Circuit Court of Appeals.

The first twelve (12) pages of Respondent's Brief reiterates what Respondent contends are pertinent sections of the Statute, Regulations of the Administrator and statement of facts applicable to the case. Suitable comment thereon will be made by Petitioner in his argument hereinafter.

1. (Resp. Br., pp. 12-16) In this portion of its

Brief, Respondent attempts to demonstrate that because Petitioner had an office for the transaction of business in Seattle, Washington, and that the liquor shipments destined for Alaska had to pass through Seattle, Petitioner thereby was constituted a seller in the "Continental United States to purchasers outside of the Continental United States," and that his sales to Alaska buyers "were export sales within the definition of that term as used in the Second Revised Maximum Export Price Regulation." (Sec. 11a, 2nd Rev. Max. Ex. Pr. Regulation (8 F.R. 4132)) Respondent quotes the decision of the District Court as affirming that principle.

In answer thereto may we advert to the basic law establishing the Office of Price Administration. A reference to the Emergency Price Control Act of 1942 (50 U.S.C.A. 901 *et seq*) shows that "it is in the interest of the national defense and security and necessary to the effective prosecution of the present war, and to prevent speculative, unwarranted and abnormal increases in prices * * * and other disruptive practices resulting from *abnormal market conditions*" (Sec. 1 (a)). "Whenever in the judgment of the Price Administrator * * * the *prices of a commodity* have risen * * * in a manner inconsistent with the purposes of this Act he may by regulation or order *establish such maximum prices* * * * as will effectuate the purposes of the Act" (Sec. 2(a)). "It shall be unlawful for any person to *sell or deliver any commodity* * * * in violation of any regulation or order under Section 2 * * *" (Sec. 4(a)).

It will thus be noted that the sole purpose of the Act is to *control prices to prevent "abnormal market conditions" where the "sale and delivery" of commodities take place.*

It should be further noted that there is nothing in the Act which authorizes or empowers the Administrator to designate by a regulation, order, interpretation, or opinion, where a merchant vendor shall carry on his business nor how such merchant vendor shall operate such business. The Administrator's sole responsibility is to control the prices of goods *sold and delivered* by such merchant vendor at the *market of such sale* so that there may not be an *"abnormal market condition."*

All parties to this case agree that the *"market"* for the sales of the 6869 cases of Tom Burns whiskey was Alaska. It is likewise agreed from the time the the commodity left Minneapolis, Minnesota, until it reached its destination in Alaska no other market than sales to *buyers* in Alaska was ever contemplated or effectuated (Pre-Trial Order (R. 39-43)).

> Likewise it was agreed that "4. *Defendant's business since 1940 has been solely and wholly the distribution, sale, and delivery at wholesale to persons doing business in the Territory of Alaska, and in no other state or territory of the United States, of liquors and liquor products to retail dealers resident and doing business in different cities and towns throughout the entire in the Territory of Alaska.* * * *"
>
> "9. *None of the 'Tom Burns' whiskey here involved* was consumed or used in the State of Washington, nor *sold to anyone for use in the State of Washington.*"

> "H. *At no time between the dates of March 25, 1943, and October 1, 1943, was there any maximum price for the sales of 'Tom Burns' whiskey in the Territory of Alaska.* * * *"

Thus, Petitioner contends that under the basic law he is not questioning the validity of the 2nd Revised Maximum Export Price Regulation, but merely the *oral* applicability of that regulation to the facts of this case by a Seattle representative of the Price Administrator.

In this connection, Petitioner cited that *the oral designation* by the Price Attorney of the sale by K. & L. Distributors to Petitioner as being a "domestic" sale in Seattle was contrary to the law of the State of Washington (Pet. Br. 39-49). Counsel for the Re-Respondent concedes (Resp. Br. 15-16) that under the Commerce Clause this whiskey was being transshipped through the State of Washington to Alaska, and that "The sales of the liquor in question by K. & L. Distributors to Petitioner were specified to be 'For export to Alaska only.'" That concession, in itself, demonstrates that Alaska was always the contemplated market for this particular whiskey, and the unapplicability to Petitioner of the *oral* interpretation made by the Administrator's representative. If such representative had rendered a *written* order, opinion, or interpretation, as to applicability of the Regulation to this case, there would have been presented a much different question for determination by this Court. But the "*oral*" designation of the sale being a "domestic" sale in the State of Washington—where such domestic sale cannot be made—surely is not to be up-

held by this Court; particularly, when such "*oral*" interpretation is contrary to the opinions of every other court than the lower court in this case.

2. Respondent argues (Resp. Br., pp. 16-17) that Maximum Price Regulation 194 has no applicability to the present case because that Regulation contains a clause set forth therein that

> "Export sales from a seller in the Continental United States to a purchaser in Alaska shall be governed by the maximum prices established for export sales by the Revised Maximum Export Price Regulation." * * * "But the obvious purpose of Sec. 1418-61 was to make Maximum Price Regulation 194 the only regulation applicable to those sales in Alaska which were covered by it." Resp. Br. 16-17 and footnote 4).

Petitioner has quite fully set forth the facts, and the law appertaining thereto, in his Brief (Pet. Br. 19-21, 89-94). May we, however, advert to Respondent's own recital of his claimed applicable sections of Regulation 194 (Resp. Br. 8) Section 1418.63 Definitions (5) was a part of the *original* M.P.R. 194 (7 F.R. 5909) which was promulgated by the Administrator *on July 29, 1942* (Such section is quoted in the previous paragraph herein).

> "In the fall of 1942 a comprehensive review of all existing price regulations was undertaken. As a result the Administrator concluded that freeze prices should, wherever possible, be replaced by specific dollars and cents prices * * * This program was gradually carried out both in the Continental United States and in Alaska." This was the pronouncement of the Administrator himself.

In the Matter of Anchorage Grocery. Opinion on Order Denying Protest, Docket No. 1288-2-P., April 6, 1945, 3 Opinions and Decisions of the Administrator, 3 O.P.A. Service, pp. 156-157.

In the Matter of Otto Kraft & Sons, 3 O.P.A. Service, pp. 223-224.

Pursuant thereto, an Amendment to Maximum Price Regulation 194 was made *on January 15, 1943* (Shyman's Ex. S. 1, M.P.R. 194, Amendment No. 10) which provided that such Regulation should 'supercede the provisions *of all other* maximum price regulations" appertaining to sales and deliveries to a *buyer in Alaska*, "except where other price regulations provide that * * * such other regulations shall apply to Alaska."

Subsequently, *on April 5, 1943*, there was made effective *Second* Revised Maximum Export sales from Continental United States. Such *Second* Revised Maximum Export Price Regulation *made no statement* therein that *such Regulation "shall apply to Alaska."* Such *Second* revision is so materially different in its most important provisions, that it can be deemed as nothing other than a new regulation entirely sufficient in itself and superceding, as well as cancelling, the previous Revised Maximum Export Price Regulation alluded to in the original Maximum Price Regulation 194 (R. 705). Thus, in point of time, there being no mention made in such *Second* Revised Maximum Export Price Regulation of its application to Alaska, Amendment 10 of Maximum Price Regulation 194, makes the sales by Petitioner to his *buyers* in Alaska come within the terms of that Alaska regulation.

Since the "comprehensive review" of all Regula-

tions, the Amendment No. 10 to Maximum Price Regulation 194, and the promulgation of *Second* Revised Maximum Export Price Regulation all occurred within four months of each other, there can be no doubt but what the Administrator himself had in mind that Alaska was an entity in itself because of its peculiar climatic and geographical situation and that the *one* Maximum Price Regulation 194 should be applicable to all purchases by buyers in Alaska.

3. Respondent (Resp. Br. 17-18) apparently has no answer other than from its viewpoint Petitioner is challenging the validity of the "formula" method by insisting that a maximum price in Seattle for 'Tom Burns' Whiskey must have been established by a written order of the Administrator or by one of his authorized assistants.

This contention has been very completely covered by Petitioner's previous presentation. (Pet. Br. 32-39). The basic Act of 1942 (50 U.S.C.A. 901 *et seq.*, Sec. 1 (a)) stipulates that the Administrator must "establish a maximum price." The Anchorage and Kraft cases cited *supra* recited that "dollars and cents" prices at the place of delivery were necessary. Practically every case which Respondent can cite, determines that though the formula method is correct, yet such formula must be reduced to a dollars and cents price by *written order* of an authorized official before damages can be recovered against a claimed violator. A mere *oral* interpretation, even upon a witness stand, is insufficient, according to the Martini case cited by Respondent as his only authority on this point (Resp. Br. 17). What was the price in Seattle for 'Tom Burns'

Whiskey? According to Respondent's trial counsel "there is nothing in that Order"—Order No. 3, upon which Respondent relies herein—"which is a dollars and cents order, duly filed, that fixes the price—dollars and cents or otherwise—*either in Seattle or for export from Seattle*, and it is conceded by the Pre-Trial Order that *there is no price fixed in Alaska*" (R. 714; 763). *No authorized official representing Respondent ever applied any formula to the establishment of a ceiling price for 'Tom Burns' Whiskey in Seattle by any written order.* It should have been proven affirmatively in this case by the Administrator that he had issued a written order wherein properly he had ascertained and worked out the formula by applying the dollars and cents costs of freight and other expenses designated in the Order and that the resultant effect designated a dollars and cents value *for Seattle.* Admittedly, that was never done.

4. (Resp. Br. 18-21) As reiterated hereinabove, the requirement of the law is that the Administrator *must establish* a dollar and cents value of the commodity in Seattle by a *written order.* There is no duty imposed upon Petitioner to apply to the Administrator for a price in his particular case, prior to making a sale. It is true, if a price has been fixed by a written order, and a sale is made violative thereof, Petitioner's ignorance of the fixed price would not excuse his payment of the resultant damage. In that case, it may be that the rule of the cases cited by Respondent (Resp. Br. 20) would be applicable. An examination of such cases reveals that the defendant in each case relied upon estoppel as a defense and avoidance of his violation.

But the Procedural Regulation (7 F.R. 8961) cited by Respondent (Resp. Br. 8, 9, 10) specifically states that a requested interpretation "shall be applicable only with respect to the particular person to whom, and to the particular factual situation with respect to which, it is rendered." Such an interpretation is not a compliance by the Administrator of his bounden duty to establish a maximum price in Seattle by a written order under the law. His failure to perform his duty cannot be shifted to the merchant's shoulders by a statement that 'you must make a request for an interpretation.' "

Petitioner deems that his argument (Pet. Br. 50-54) has not been answered by Respondent's attempt to thrust the liability upon Petitioner because of an alleged failure to ask an official interpretation.

Such argument, moreover, has been fully answered by Petitioner in his Brief (Pet. Br. 54-87). In that connection, attention is called to the facts (Pet. Br. 83-87) wherein Petitioner as well as others in the trade applied for interpretation and were given written assurances by an authorized Price Attorney, that the "price at which acquired" was the correct basic price. It was not until August, 1943, at which time Petitioner had sold about three-fourths of his stock of 'Tom Burns' Whiskey, that a new interpretation, based upon a "maximum domestic price" theory was *orally* suggested by some of Respondent's offiicals as being the proper method of determining a basic price. But, although the "price at which acquired" theory had received written sanction, no official would put into writing any price worked out on a "Maximum

domestic price" theory. Consequently, no method of appeal to the Emergency Court of Appeal was open to Petitioner. After the commencement of the action, decisions of the Emergency Court of Appeal—as quoted in Petitioner's Brief (Pet. Br. 31-39)—determined the law to be that when it was a matter of interpretation of a Regulation and applicability of the provisions to the particular price governing a sale, the jurisdiction of the District Court was complete and there was no need to apply the "five days after judgment" rule since no question of validity was involved.

5. No reference is made by Respondent (Resp. Br. 21-25) to Petitioner's decisions and the applicability of such decisions to the facts of this case (Pet. Br. 49-87). At the bottom of page 21 of its Brief, Respondent notes that the "cost of acquisition" theory was a recognized legal method of computation of basic price, until the passage of the Third Revised Maximum Export Price Regulation, some six months after the sales had occurred in this case. Such statement merely confirms the statement of Maximum Price Regulation 445, made on May 2, 1944, where so-called over ceiling purchases had been recognized and practiced (Pet. Br. 62) under the "price at which acquired" doctrine.

It must be remembered that Petitioner was not charged with "over-ceiling purchase." There is no question as to good faith of Petitioner in following the practice existent in the Alaska trade since 1934; therefore, there was no "joyful" aiding of a seller in the violation of a law. (Resp. Br. 23). Respondent

is unfortunate in its selection of the case of *U.S. vs. Lutz*, 142 F.(2d)985, 989 (C.C.A. 3). In that case the court distinctly held that the method of oral testimony of an investigator upon the stand, testifying in the same manner as the witness Geraghty did in this case, was not competent proof of, but were conclusions as to, the so-called ceiling price; but since the opposing counsel made no objections the evidence was allowed to stand in the quoted case. Furthermore, that case is authority that in order to hold the defendant liable for "over-ceiling" purchase, he must be charged therewith. There was no charge of such nature set forth in Respondent's Complaint in this case.

Petitioner does not deem that any of the theoretical discussion of possible results of the "price at which acquired" doctrine (Resp. Br. 22-24) has any applicability to this case, since no facts nor proofs *of any kind* to support such discussion were rendered in this case. This is the first time that such theories have been advanced by any of Respondent's counsel, and since such theories were not presented to either of the lower courts in this case, they should not be considered by this Court.

Furthermore, no "official interpretation" setting *any price*—either legal or illegal—on 'Tom Burns' Whiskey *in Seattle* was ever rendered by any authorized official of the Office of Price Administration within the purview of Revised Procedural Regulation 1 (7 F.R. 8961) which Respondent quotes in its brief (Resp. B. 9, 10). This Court can take judicial knowledge of the fact that not only in all large mercantile establishments, but in every corner grocery

store and family meat market, in the United States during the war, prices of commodities were posted on each article to be sold. Those prices were officially designated by the Administrator, or his authorized assistants, in accordance with the basic Act of 1942, and were not obtained by the laborious circumlocution of having the merchant "request an interpretation" in accordance with Revised Procedural Regulation No. 1 as designated in Respondent's Brief (Resp. Br. 8, 9).

Concerning Respondent's argument (Resp. Br. 24-25) that Recent Price Interpretation No. 17—Plaintiff's Ex. 6—was available as an aid to the Court (Resp. Br. 25) may we respectfully state that no such interpretation was ever included in *Second* Revised Maximum Export Price Regulation which is the regulation under which the present action is being prosecuted (R. 699). Such Interpretation No. 17 was promulgated in an interoffice communication referring to an interpretation of the original Revised Maximum Export Price Regulation, was *not* included in the *Second* Revised Maximum Export Price Regulation—April 5, 1943 to September 30, 1943, during which period the sales in this case were made by Petitioner—and was corrected by Maximum Price Regulation 445 on September 30, 1943. Lengthy discussion of the admissibility of such interpretation was made before the District Court (R. 683-707) but neither the District Court nor the Circuit Court of Appeals apparently gave any heed to the so-called Interpretation No. 17 as an "aid" in their decisions and consequently, this Court likewise should give equally as little con-

sideration thereto. This is particularly true since *no price* on 'Tom Burns' Whiskey in Seattle had been made while Interpretation No. 17 was in force even as an inter-office "aid."

Again, counsel for Respondent chose an unfortunate decision to reinforce his argument, by citing *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 417. In that case the bulletin or the "administrative construction," was "made available to manufacturers as well as to wholesalers and retailers" in a written form in a paper entitled "What Every Retailer Should Know About the Maximum Price Regulation." In the present case, however, Interpretation No. 17 was contained in an inter-office O.P.A. communication service not available in any public law library in Seattle and found only in the Office of Price Administration offices or in the private law files of some attorney connected with such Office of Price Administration. Furthermore, it should be noted that in the Seminole case, page 415(3) a definite dollars and cents price of "60 cents per ton for crushed stone" had been fixed by the Administrator's authorized official assistant.

Again, may it be reiterated that no official ceiling price in Seattle for 'Tom Burns' Whiskey has ever been established by *any* official of the Office of Price Administration in a written order.

6. (Resp. Br. 25-26) The decision of the Emergency Court of Appeals as to the applicability of Paragraph (d) Sec. 205, Act of 1942 (Pet. Br. 95-99) when Petitioner's good faith has been found by the District Court, should be upheld by this Court. The facts of the present case are exactly in line with the

facts set forth in such case of *Fleming v. Van der Loo*, 160 F.(2d)906, at 911-913. Respondent's argument (Resp. Br. 26) concerns Paragraph (e) of Section 205, Act of 1942, a different section than that referred to by the Court hereinabove quoted.

As to Respondent's footnote (Resp. Br. 26), the goods had been sold by the time Petitioner learned in August, 1943, that there was some question of over-ceiling price and therefore it was too late for Petitioner to do otherwise than he did in this case, in his attempts to ascertain what the ceiling price was (Pet. Br. 83-85) and what the law was as determined by the Emergency Court of Appeals and by other courts (Pet. Br. 67-81).

7. (Resp. Br. 27-28) In answer to Respondent's contention that "it is unnecessary to consider the merits of" Petitioner's charge that established business practices were being overturned in this case, contrary to law, may we request this Court to read again Petitioner's cases and argument thereon (Pet. Br. 106-107, 86-87). Since "applicability" of the Office of Price Administration officials rulings are in question in the present case and not the "validity" of any regulation, the "five days after judgment" law (Resp. Br. 27-28) cannot be invoked by Petitioner.

8. (Resp. Br. 28-29) Petitioner considers that his argument (Pet Br. 107-111) has in no way been refuted, or denied, by Respondent's contention. The K. & L. Distributor's case, it is claimed by Respondent, established a maximum *domestic* price in Seattle based upon Order No. 3. It was such claimed maxi-

mum *domestic* price which constituted the so-called "over-ceiling" charge in this case. The identical whiskey, and the identical over-charge, constituted the so-called basic price in the one transaction. Such single transaction—the sale by K. & L. Distributors to Shyman, or the purchase by Shyman from K. & L. Distributors—whichever way counsel may put it—is the gravamen of the two cases. The so-called "ceiling" price was based on that one transaction. Since Respondent has been paid in full by K. & L. Distributors for that one act, it seems unjust and inequitable for Respondent to collect a second time the equivalent amount of money as damages from Petitioner.

PRAYER

Petitioner respectfully submits, again, that the decision of the Ninth Circuit Court of Appeals should be reviewed and reversed by this Court.

Respectfully submitted,

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December 19, 1947.